

THE
MECHANISM
OF THE
MODERN STATE

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THE
MECHANISM
OF THE
MODERN STATE

A TREATISE ON
THE SCIENCE AND ART OF
GOVERNMENT

BY

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BOOK V
THE EXECUTIVE

XXIII. THE PROBLEM OF THE EXECUTIVE (I)

Personal Monarchy

'Nec regibus infinita aut libera potestas'—TACITUS, *Germania*.

'Rex autem habet superiorem, Deum scilicet; item legem per quam factus est rex, item curiam suam, videlicet comites, barones, quia comites dicuntur quasi socii regis, et qui habet socium habet magistrum: et ideo si rex fuerit sine fraeno, id est, sine lege, debent ei fraenum ponere, nisi ipsimet fuerint cum rege sine fraeno'—BRACTON (13th century)

'A King of England cannot at his pleasure make any alterations in the laws of the land, for the nature of his government is not only regal but political.'—SIR JOHN FORTESCUE, *De Laudibus Legum Angliae* (15th century).

'Lex facit regem; the King's grant of any favour made contrary to the law is void; what power the King hath he hath it by law, the bounds and limits of it are known.'—HOOKER (16th century)

'The government by a single person and a Parliament is a Fundamental. It is the *esse*, it is Constitution'—CROMWELL (17th century).

'The executive part of Government . . . is wisely placed in a single hand by the British Constitution for the sake of unanimity, strength and despatch. The King of England is therefore, not only the chief but, properly the sole magistrate of the nation; all others acting by commission from and in due subordination to him.'—BLACKSTONE (18th century)

THE business of the Legislature is to enact general rules for the conduct of citizens and to impose taxes. It is the function of the Executive to carry out those rules and to collect and expend the taxes authorized by the Legislature:

Legisla-
ture and
Execu-
tive

. . . 'the governmental business classed as executive', writes Mr. Henry Sidgwick, 'should include all the measures required for the due protection of the interests of the community and its members in their relation with foreigners, especially the organization and direction of the military forces of the State; all the actions not strictly judicial required to prevent members of the community from causing injury to each other or to the public interests and to secure their co-operation for common ends, so far as this is not better left to voluntary association; and finally all the industry required for utilizing such part of the wealth and resources of the

community as it is expedient to keep in public ownership, and for providing all commodities needed by the State or its members that are not better provided by private industry and free exchange.¹

In brief, the Executive is concerned with the defence of the realm against external or internal enemies, with the maintenance of law and order, and with the performance of such other functions as may be claimed for the State by the Legislature

Problems
of the
Execu-
tive

The problems which naturally present themselves in connexion with this branch of government are (i) Shall the Executive be distinct from the Legislature and the Judiciary, or shall the same men act in more than one capacity? (ii) In either case, how shall members of the Executive be selected? (iii) Shall their tenure be fixed or variable, and if variable, on what shall it depend?

The first of these questions has given rise to prolonged discussion, and has been, and probably will be, answered differently, according to circumstances. To the second and third the answer, suggested by the experience of most of the States of the modern world, would generally be that the Executive ought to consist partly of permanent, partly of temporary officials, and that no single method of appointment is appropriate to the two different classes.

The modern State largely relies, for its efficient administration, upon a large supply of professional and permanent officials, who in the aggregate form the *Civil Service* or *Administration*, or *Bureaucracy*. The best method of selecting these permanent officials is a matter of high moment, and will demand consideration in a later chapter. It is the members of this service and their employees who, strictly speaking, form the executive branch of government. The Ministers of State are not, strictly regarded, the Executive. Neither the King nor the Chancellor of the Exchequer personally collects the taxes: that function is performed by subordinate officials of the Board of Customs and Board of Inland Revenue. Neither the

¹ *Elements of Politics*, p. 385

Secretary of State for War nor the First Lord of the Admiralty ever fires a gun or commands forces in the field or at sea. The King or President or Ministers do, however, supply the motive power to the Executive. Then orders 'bring into action the departments of government concerned' ¹

The present and following chapters will, then, be concerned with the higher officials of the State, with what, in common parlance, we speak of as the *Government*, or with greater though not complete precision, as the Executive.

The central problem to be solved in this connexion has been clearly propounded by an old-fashioned writer. 'The great problem of Government is to make the Executive power sufficiently strong to procure the peace and order of society and yet not to leave it sufficiently strong to disregard the wishes and happiness of the community' ². Briefly it may be said that the Executive should be at once strong and responsible. On the indispensability of strength in an Executive the prudent architects of the American Constitution were under no illusion. Alexander Hamilton exposed the vulgar error that a vigorous Executive is inconsistent with the genius of republican government.

The
Central
Problem

'Energy in the Executive', he wrote, 'is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks, it is not less essential to the steady administration of the laws, to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice, to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.' ³

The same great publicist found the ingredients which constitute energy in the Executive to consist of, first, unity, secondly, duration, thirdly, an adequate provision for its support, fourthly, competent powers.

For many centuries the world looked for these ingre-

Monarchy

¹ Anson, *Law and Custom of the Constitution*, II 142

² William Smyth, Regius Professor of Modern History at Cambridge (1807-49)

³ *The Federalist*, No. LXX

dients in hereditary kingship. Monarchy supplies an intelligible and not infrequently highly efficient Executive, and one which is not necessarily less responsible because it does not depend upon popular election. Monarchy has sometimes represented the patriarchal, sometimes the military principle—the head of a ruling family, or, as among the Teutonic peoples, the successful leader in war (the *dux*) becomes a king, and may develop either into the Great Leviathan of Hobbes, or into the constitutional ruler preferred by Locke.

Parliamentary
Executive or
Presidential

For the modern world the choice of a supreme Executive would seem to lie between the Parliamentary Executive typified by England or France, and the Presidential Executive of which the United States of America affords the most conspicuous illustration. Until 1918 it might have been necessary to add a third alternative, the absolute but administrative monarchy of the Hohenzollern type, and it may still be proper to notice a type of Executive which is neither strictly Parliamentary nor strictly Presidential—that which obtains in the Helvetic Republic. The Swiss model may, however, be regarded as an exotic, the peculiarities of which have already received consideration. For practical purposes we may confine the discussion to the Presidential and the Parliamentary types.

Both, it will be observed, are compatible with either a Monarchical or a Republican Constitution. As regards the position of the Executive, Republican America had much more in common with Imperial Germany than with Republican France, Monarchical England has more in common with Republican France than it had with Imperial Germany. In England a Parliamentary Executive has been evolved under the aegis of an hereditary monarchy, in the King all Executive authority is still legally vested, in the King's name all Executive acts are done.

The
Crown

With the position of the Crown, therefore, the analysis of the Executive authority must begin.

Half a century ago Walter Bagehot startled his contem-

possibilities of the mid-Victorian era by an enumeration of some of the legal powers of the Crown

'The Queen', he wrote, 'could disband the army (by law she cannot engage more than a certain number of men), she could dismiss all the officers, from the General Commanding-in-Chief downwards, she could dismiss all the sailors too, she could sell off all our ships of war and all our naval stores, she could make a peace by the sacrifice of Cornwall, and begin a war for the conquest of Brittany. She could make every citizen in the United Kingdom, male or female, a peer, she could make every parish in the United Kingdom a "university", she could dismiss most of the civil servants, she could pardon all offenders. In a word, the Queen could by prerogative upset all the action of civil government within the Government, could disgrace the nation by a bad war or peace, and could, by disbanding our forces, whether land or sea, leave us defenceless against foreign nations.'¹

Bagehot's rhetorical statement startled the unlearned and even to the pundits appeared a trifle paradoxical. But it pointed to a fact, apt to be ignored—the immense reserve power vested by the English Constitution in the Crown. Six hundred years of unbroken constitutional development, the evolution of new constitutional devices, the growth and decay of institutions, had affected but little the legal position of the Crown. The legal powers of Queen Victoria differed infinitesimally from those of Queen Elizabeth, those which she was to hand on to Edward VII were substantially the same as those which Edward VI inherited from Henry VIII.

It is rarely safe in English Constitutional History to assign to a precise date a constitutional change of outstanding significance, yet the popular verdict which indicates the year 1688 as that which marked the birth of the modern phase of the English monarchy is not grossly at fault. More precise historians prefer the year of the accession of the first Hanoverian King (1714) as the birthday of 'Constitutional Monarchy', and designate George I—for reasons to be hereafter set forth—as the

The
Revolution
of
1688

¹ *English Constitution*, 2nd edition (1872), p. 132.

first 'Constitutional' King of England. It is sufficiently accurate to say that down to the 'Revolution', inaugurated by the 'abdication' of James II in 1688, and consummated by the accession of George I in 1714, or perhaps by the Ministry of Walpole (1721-42), England was ruled by Kings. Thereafter the King, according to the classic aphorism of M. Thiers, reigned but did not rule. Down to the 'Revolution' the Crown was the essential and effective factor in the Constitution. On the personal character and ability of the King depended the government of the State and the well-being of the people. Other factors—economic, intellectual, and political—naturally contributed to the prosperity of one epoch, to the adversity of another. But as was the King, so, broadly speaking, were the people. An Edward III could not avert a catastrophe like the great pestilence of 1349 nor greatly mitigate its effects. The shrewdness of an Elizabeth could not ward off from her people the suffering caused to them by the flooding of the European markets with the product of the silver mines of America. Nevertheless it was true that a good king meant a prosperous people, and that the reign of a bad king was marked by individual suffering and national humiliation. Since the 'Revolution' that has been less true, though George III, a man of weak intellect, albeit strong will, contributed not a little, at one period of his reign, to the humiliation of his country.

Such changes, however, as that from personal rule to Constitutional monarchy are not, as a rule, catastrophic in this country. They are almost invariably the result of gradual evolution. Notably was this so in regard to the change under discussion. Yet the crisis was, in fact, reached in the seventeenth century.

When James I ascended the English throne he found Parliament in a critical, not to say a truculent, temper. It was ready and anxious to assert those prerogatives which, if not allowed altogether to lapse during the dictatorial rule of the Tudors, had been maintained with rare discretion.

During the fourteenth and fifteenth centuries the growth

of Parliamentary privileges had been too rapid, Parliament had claimed rights and exercised functions to which neither Parliament itself nor the nation was equal. The 'revolution' which brought the House of Lancaster to the throne was essentially a parliamentary revolution. The Lancastrians 'stood', if we may anticipate the phraseology of modern democracy, upon a constitutional programme. Henry IV could not, 'without discarding all the principles he had ever possessed, even attempt to rule as Richard II and Edward III had ruled'.¹ Archbishop Arundel promised on his behalf that he would 'be counselled and governed by the honourable, wise, and discreet persons of his kingdom and by their common counsel and consent', would do his best for the governance of himself and his kingdom, not wishing to be governed of his own will nor of his own 'voluntary purpose or singular opinion', but 'by common advice, counsel, and consent'. The Lancastrians did their best to fulfil the promises of their ecclesiastical sponsor. They even attempted a constitutional experiment which, in some sense, anticipated that solution of the problem which, three centuries later, found expression in the Cabinet. From 1404 to 1437 the King's Council was not merely dependent upon Parliament, but was actually nominated in it: the subordination of Executive to Legislature was never so complete. But the result was a dismal failure. And it is pertinent and instructive to inquire why a political device which justified itself so completely at a later period so signally failed in the earlier?

The plain truth is that 'Responsible Government' is no simple or easy thing. It demands for its success conditions—social and political—which are never found except in highly developed societies. In the England of the fifteenth century some of the conditions were notably absent. 'Constitutional progress', to quote a pregnant aphorism of Bishop Stubbs, 'had outrun administrative order'. Politically advanced, the nation was socially backward. The development of the parliamentary machinery had

¹ Stubbs, *Constitutional History*, III, 6

been too rapid for the intelligence of the nation at large. The result was that while Parliament was busy in establishing its rights against the Crown, the nation was sinking deeper and deeper into social anarchy.

Bastard
Feudal-
ism

A small knot of powerful barons were reproducing some of the worst features of feudalism without its redeeming advantages. Private wars became more common than they had ever been since the miserable days of Stephen. Baron was at war with baron, county with county, town with town. Disbanded soldiers coming home from the French wars took service with rival chieftains, accepted their liverys, and fought their battles. The great lord, in turn, protected or, to use the technical term, 'maintained' his liveried followers and shielded them from the punishment due to their crimes of violence. Thus law was paralysed, justice became a mockery, and the whole nation, outside the charmed circle of the great lords and their retainers, groaned under the 'lack of governance' which quickly became the byword of Lancastrian administration. Plainly the nation 'was not yet ready for the efficient use of the liberties it had won', the time for a parliamentary Executive had not come, and the people, reduced to social confusion by the weak and nerveless rule of the Lancastrians, involved in aristocratic faction fights to which the quarrels of York and Lancaster gave a deceptively dynastic colour, at length emerged from those 'Wars of the Roses' anxious for the repose and discipline secured to them by the New Monarchy.

The
Tudor
Dictator-
ship

For a century the Tudors continued to administer the tonic which they had prescribed to a patient suffering from social disorder and economic anaemia. The evolution of the parliamentary machinery was temporarily arrested, but, meanwhile, the people thrived socially and commercially. Aristocratic turbulence was sternly repressed, extraordinary tribunals were erected to deal with powerful offenders, vagrancy was severely punished, work was found for the unemployed, trade was encouraged, the navy was organized on a permanent footing, scientific

training in seamanship was provided, excellent secondary schools were established—in these and in many other ways the New Monarchy, despotic and paternal though it was, brought order out of chaos and created a new England. The maintenance of law, the growth of a strong middle class, the diffusion of wealth and education, above all, the critical temper of Protestantism, reacted in their turn upon political development. The result was that by the close of the sixteenth century the nation was ready, as it had not been ready at the beginning of the fifteenth, for the efficient use of the liberties it had won. The Tudor 'dictatorship' had done its work, and in no direction were its results more clearly marked than in the broadening and strengthening of parliamentary institutions. The experiment of making Parliament the direct instrument of Government had broken down in the fifteenth century because it was premature, because the political intelligence and the social development of the people at large lagged hopelessly behind the structural evolution of the parliamentary machine. Thanks in part to the strong and bracing rule of the Tudors and in part to a many-sided economic revolution, social had now caught up political development. Consequently, the Stuarts from the moment of their accession found themselves confronted by a people not merely ready but anxious to take upon their own shoulders the high responsibilities of self-government.

The 'Apology' drawn up by Parliament in 1604 sufficiently attests the new temper of the nation. In that famous document the Commons made it abundantly clear that the era of the Tudor dictatorship was definitely closed, and that they were no longer disposed to acquiesce in the virtual suspension of their privileges and authority. The King, they avowed, had been grossly misinformed alike as to the 'estate of his subjects of England', as to 'matter of religion', and as to 'the privileges of the House of Commons', and it was their bounden duty to set him right.

'We stand not in place to speak or do things pleasing Our care is, and must be, to confirm the love and tie the hearts of

The
Stuart
Monar-
chy

your subjects, the Commons, most firmly to your Majesty Herein lieth the means of our well deserving of both there was never prince entered with greater love, with greater joy and applause of all his people This joy, this love, let it flourish in their hearts for ever Let no suspicion have access to their fearful thoughts, that their privileges, which they think by your Majesty should be protected, should now by sinister informations or counsel be violated or impaired, or that those, which with dutiful respects to your Majesty, speak freely for the right and good of their country, shall be oppressed or disgraced Let your Majesty be pleased to receive public information from your Commons in Parliament as to the civil estate and government, for private informations pass often by practice the voice of the people, in the things of their knowledge, is said to be as the voice of God And if your Majesty shall vouchsafe, at your best pleasure and leisure, to enter into your gracious consideration of our petition for the ease of these burthens, under which your whole people have of long time mourned, hoping for relief by your Majesty, then may you be assured to be possessed of their hearts, and, if of their hearts, of all they can do or have ' ¹

Consideration for the old Queen combined with anxiety as to the succession had conduced to a conscious postponement of the constitutional issue ' In regard of her [Queen Elizabeth's] sex and age, which we had great cause to tender and, much more, upon care to avoid all trouble, which by wicked practice might have been drawn to impeach the quiet of your majesty's right in the Succession, those actions were then passed over, which we hoped in succeeding time of freer access to your highness of renowned grace and justice, to redress, restore, and rectify ' ²

The
Contest
of the
Seven-
teenth
Century

Thus, in the very last year of the new reign was the key-note of the impending struggle struck To follow the incidents of that struggle is no part of my purpose It must suffice to recall one or two of the more important landmarks For five-and-twenty years James I, and his son after him, attempted the impossible task of reconciling

¹ *State Papers (Dom)*, James I, viii 70

² *Ibid*

the Stuart theory of kingship with the advancing claims of Parliament and particularly of the House of Commons. The first act of the drama closes with the concession of the Petition of Right (1628), with the dissolution of Charles's third Parliament (1629), and the death in the Tower of the 'proto-martyr of Parliamentary independence', Sir John Eliot (1633). The Petition of Right determined no general principles, but, after our English manner, provided certain remedies for the more flagrant of the practical grievances which had been disclosed by the experience of the last three years. Then followed a period of personal government, during which the Crown was unfettered either by the opposition of Parliament or by the decisions of an independent Judiciary. For eleven years (1629-40) no Parliament met, the ordinary administration of justice was set aside by the Star Chamber and other extraordinary tribunals, money was raised for the necessities of the Crown by all manner of peculiar expedients, Wentworth was let loose upon Ireland (in the main to its advantage), Laud was let loose upon England and even upon Scotland, with results which proved fatal to the Stuart Monarchy. The first signal of overt resistance was given by Scotland. To require Scotland to accept Arminianism at the hands of Laud was like asking England to accept Roman Catholicism at the hands of Philip II. Intensely national and intensely Calvinistic, Scotland 'bristled into resistance', and Charles I was consequently compelled to meet his Parliament again.

The Long Parliament spent the first few months of its existence in breaking into fragments the machinery of 'Thorough' and in wreaking vengeance upon the leading agents of that system. Strafford and Laud paid on the scaffold the penalty for the failure of personal rule.

The Long
Parliament and
the
Grand
Remonstrance

The fact that it was necessary, in order to obtain for Parliament a control over the Executive, to have recourse to these 'judicial murders' affords conclusive proof that a critical turning-point in the evolution of our Constitution had been reached. Ecclesiastical issues of high significance

hung in the balance, but, on the political side, the core of the contest of the seventeenth century centred in the struggle for the control of the Executive. As to the existence of a parliamentary Legislature there was no real question. Bacon and Strafford were at one with Eliot and Pym as to the advantages derived by the Monarchy from the periodical meetings of an elected Legislature.

'Look on a Parliament as a certain necessity, but not only as a necessity, as also a unique and most precious means for uniting the Crown with the Nation, and proving to the world outside how Englishmen love and honour their King, and their King trusts his subjects. Deal with it frankly and nobly as becomes a king, not suspiciously like a huckster in a bargain. Do not be afraid of Parliament. Be skilful in calling it, but do not attempt to 'pack' it. Use all due adroitness and knowledge of human nature, and necessary firmness and majesty, in managing it, keep unruly and mischievous people in their place, but do not be too anxious to meddle, "let nature work", and above all, though of course you want money from it, do not let that appear as the chief or real cause of calling it. Take the lead in legislation. Be ready with some interesting or imposing points of reform or policy, about which you ask your Parliament to take counsel with you. Take care to "frame and have ready some commonwealth bills, that may add respect to the King's government, and acknowledgement of his care, not *wooing* bills to make the King and his graces cheap, but good matters to set the Parliament on work, that an empty stomach do not feed on humour "'

Such was, in substance, the sagacious advice tendered by Bacon to James I. Between Crown and Parliament there could in his view be no essential antagonism. And Bacon's language is echoed in that of Sir John Eliot.

'For the King's Prerogative no man may dispute against it, it being an inseparable adjunct to royalty. For the privilege of Parliament they have been such and so esteemed as neither to detract from the honour of the King, nor to lessen his authority. This methinks should endear the credit of our Parliaments that they intrench not upon but extend the honour and power of the King. Parliament is the body the

King is the spirit, the author of the being of Parliament. What prejudice or injury the King shall suffer, we must feel.'

While, however, there was little difference of opinion as to the existence of a Parliament there was much as to its functions. Bacon would have had it vote taxes, help to make laws, and keep the King well informed as to the state of public feeling. The functions of Parliament were, in a word, to be legislative, taxative, and informative. To these Pym and his party desired to add a fourth and to give to Parliament an effective control over the Executive. To this extension of functions the older fashioned constitutionalists, Bacon, Strafford, Hyde, and the like, strongly demurred. That Parliament should be permitted to meddle in the 'mysteries of State', that it should interfere in the intricacies of foreign policy, that it should presume to exercise a continuous control over the Executive, that it should hold the servants of the Crown responsible to itself, was unthinkable. This was, however, the point on which from the outset of the contest Eliot, and after him Pym, laid most stress. 'That His Majesty be humbly petitioned by both Houses to employ such counsellors, ambassadors, and other ministers, in managing his business at home and abroad as the Parliament may have cause to confide in, without which we cannot give His Majesty such supplies for support of his own estate, nor such assistance to the Protestant party beyond the sea, as is desired'.¹ So ran the most significant clause in the *Grand Remonstrance* of 1641.

The Civil War ensued. The King paid the penalty for the failure of his appeal to arms (1649), and his death was quickly followed by the abolition of the Monarchy.

On 17 March 1649 the Rump of the Long Parliament employed such remnant of legal authority as it still retained to pass an 'Act' abolishing the office of king.

'Whereas', so the 'Act' ran, 'Charles Stuart, late King of England, Ireland, and the territories and dominions thereunto belonging, hath by authority derived from Parliament been

¹ *Grand Remonstrance*, § 197.

and is hereby declared to be justly condemned, adjudged to die, and put to death for many treasons, murders, and other heinous offences committed by him. And whereas it is and hath been found by experience that the office of a king is unnecessary, burdensome and dangerous to the liberty, safety and public interest of the people, and that for the most part use hath been made of the regal power and prerogative to oppress and impoverish and enslave the subject. Be it, therefore, enacted and ordained that the office of king shall not henceforth reside in or be exercised by any one single person, and that no one person whatsoever shall or may have or hold the office, style, dignity or authority of King of the said kingdoms or dominions.

The
Cromwel-
lian Pro-
tectorate

It was comparatively easy to get rid of the Monarch, it was much more difficult to get rid of the Monarchy. The 'Rump' made a bold bid for Sovereignty, perpetual, unrestrained, and undivided, but Cromwell and the army intervened to prevent this usurpation, and Cromwell, little to his liking, found himself invested with an authority limited only by the necessity for retaining the loyalty of his Ironsides. To devolve upon a representative Assembly some portion of his heavy responsibility was the immediate and constant anxiety of Cromwell. Hence the summoning of the convention of Puritan nobles commonly known as Barebone's Parliament. A few months sufficed to demonstrate the failure of this experiment, but Cromwell nevertheless persevered. The *Instrument of Government* provided for the election of a single-chambered Legislature. Its brief but stormy existence proved that, though the Stuart monarchy was overthrown, the problem which had divided the Stuart monarchs and their parliaments was still unsolved. Cromwell was no more disposed than Strafford or Charles I to subordinate the Executive to the Legislature. Nay, he was not even willing to concede to Parliament constituent powers. Legislate they might, and freely, but it must be within the four corners of the 'Instrument', circumstances only were within their competence, 'Fundamentals' they must not touch. This subordinate position Parliament was unwilling to

accept, and at the first legal opportunity it was dissolved by the Protector Cromwell and many of his wisest counsellors believed that the breakdown of the experiment was due to the unicameral structure of the Parliament. Consequently a second attempt was made with a renovated 'Upper House', but with no better results. The old difficulties reappeared. Cromwell had summoned Parliament to make laws, they claimed the right to revise the Constitution and to criticize the Executive. They forgot that, disguise it how he might, the monarchy of Cromwell rested upon the sword. Had Strafford been master of Cromwell's legions the proud Lieutenant would have made short work of the Long Parliament. That Cromwell was honestly anxious to assign to an elected parliament a place in the Constitution can be denied by no unprejudiced person, but it was a strictly subordinate place. On their refusal to accept it, they had to go.

But Cromwell left no successor. His son Richard, though installed as Protector, was a poor creature and quite unequal to the task of reconciling the military and civil powers. Army and Parliament were once more at loggerheads, all classes, particularly the merchants and the lawyers, cried loudly for a 'settlement', and the weakness of Oliver's successor soon drove home a perception of the truth that without a restoration of the hereditary monarchy there could be no permanent settlement.

The Restoration had, therefore, a threefold significance: it marked, primarily indeed, the triumph of the monarchical principle, it marked not less clearly the triumph of the parliamentary principle, but, above all perhaps, it marked an emphatic repudiation of government by the sword. 'No Bishop, no King' was the formula which embodied the alliance between the Crown and the Church. 'No King, no Parliament' might, with equal significance, have been adopted as the motto of the Restoration of 1660.

It soon, however, became manifest that the Stuarts had learned their lesson very imperfectly. The native shrewdness and the extraordinary political adroitness of

The
Restoration

Charles II enabled him to outmanoeuvre the Whigs, who were almost as blind as the Stuart kings to the moral of recent events. If the Long Parliament and the Civil War proved that England had outgrown the idea of personal monarchy, the experience of the Commonwealth and Protectorate proved that England could not afford to dispense with the principle of hereditary kingship. Dryden sang

Our temperate isle will no extremes sustain
Of popular sway, or arbitrary reign,
But slides between them both into the best,
Secure in freedom, in a monarch blest.¹

Was freedom secure under the later Stuarts? The folly of the Whigs, in pressing for exclusion, permitted Charles II, despite accumulating unpopularity, to retain the throne until his death. James II had more conscience but less dexterity. With perverted ingenuity he contrived simultaneously to alienate Anglicans and Nonconformists, Tories and Whigs, the country gentlemen and the traders of the towns. The crisis of 1688 found him, therefore, almost friendless, and a relatively small and essentially oligarchical party was able to effect a transference of the Crown with a minimum of friction and virtually without opposition.

The
evolu-
tion of
1688 Burke, in his anxiety to confound the error of those who desired to establish a parallel between the English Revolution of 1688 and the French Revolution of 1789, unduly accentuated the conservative character of the former. Did we, then, assert the right to 'choose our own governors, to cashier them for misconduct, or to frame a Government for ourselves'? Far from it. There was, it is true, 'a small and temporary deviation from the strict order of a regular hereditary succession', but in the Declaration of Right all possible ingenuity is employed to keep from the eye 'this temporary solution of continuity, whilst all that could be found in this act of necessity to countenance the idea of an hereditary succession is brought

¹ *The Medal*

forward and fostered and made the most of . . . ' So far from thanking God ' that they had found a fair opportunity to assert a right to choose their own governors ', or make an election the only lawful title to the Crown, Parliament ' threw a politic, well-wrought veil over every circumstance tending to weaken the rights, which, in the meliorated order of succession they meant to perpetuate ; or which might furnish a precedent for any future departure from what they had then settled for ever '. Had the nation or its leaders wished to ' abolish their monarchy ' that was the obvious opportunity. They definitely renounced it, and reasserted the ancient and prescriptive theory of monarchical succession. A slight deviation was necessary ; but the utmost care was taken that it should be the slightest possible.

' A State without the means of some change is without the means of its conservation. Without such means it might even risk the loss of that part of the Constitution which it wished the most religiously to preserve. The two principles of conservation and correction operated strongly at the two critical periods of the Restoration and Revolution, when England found itself without a King.' ¹

The nation had, at both those periods, ' lost the bond of union in their ancient edifice '. Did they, therefore, ' dissolve the whole fabric.' On the contrary, they ' regenerated the deficient part of the old Constitution through the parts which were not impaired '.

Some allowance must be made for the circumstances under which the *Reflections on the Revolution in France* was written. Burke's point of view had perhaps been somewhat modified since the time, twenty years earlier, when he indited the *Thoughts on the Causes of the Present Discontents*. Yet the constitutional theory expounded in 1790 was undeniably sound. The Revolution of 1688 was essentially a Conservative movement. The legal and technical prerogatives were not thereby materially affected.

Nevertheless this epoch is commonly, and, in one sense,

¹ *French Revolution*, p. 49.

Effect of the Revolution rightly, selected as the dividing line between the old system and the new, as the real beginning of constitutional as opposed to personal monarchy, the subordination of the Executive to the Legislature, the responsibility of the Crown and its Ministers to Parliament.

This paradox can be fully resolved only when we proceed to deal with the evolution of the Cabinet. Meanwhile we may summarily indicate the combination of circumstances by which the change was indirectly brought about.

Considerable importance must no doubt be attached to the change in the person of the Monarch. 'It was', writes Macaulay, 'even more necessary to England at that time that her King should be a usurper than that he should be a hero. There could be no security for good government without a change of dynasty. It had become indispensable to have a sovereign whose title to the throne was bound up with the title of the nation to its liberties.' The point is put with characteristic exaggeration. William III was not a 'usurper', he did not represent a new 'dynasty', still less did his wife. Nevertheless, the 'deviation' was sufficient, as in the parallel case of Henry IV, to mark a real change in the relation of the Crown to the nation, and to register an important stage in the evolution of the supremacy of Parliament.

Regular Meetings of Parliament To the same result the increased regularity in the meeting of Parliament itself materially contributed. It was impossible that the Executive should be really responsible to the Legislature so long as the meeting of the latter was irregular, capricious, and uncertain. The impossibility of dispensing with a standing army, the jealousy with which its recent establishment was regarded, and the necessity for the annual renewal of the Act upon which its discipline depended, secured, by a device characteristically devious, the annual meeting of the Legislature.

The Civil List The change in the mode of granting supplies to the Crown, and the institution of a Civil List, supplied a further contribution to the same result. Hitherto the King had borne the whole charge of government.

between the royal revenue and the national revenue there had been no distinction. Under Charles II, indeed, the Commons had successfully maintained their exclusive right to determine 'as to the matter, measure, and time of every tax', and the principle of the appropriation of subsidies to particular purposes was definitely established. But it is with the Revolution that the effective control of the House of Commons over national expenditure really begins. To William III Parliament voted a revenue of £1,200,000 a year, of which £700,000 was appropriated to the support of the Royal Household, the personal expenses of the King, the payment of civil officers, &c., the rest being appropriated to the more general expenses of administration. George III, in return for a fixed Civil List, surrendered his interest in the hereditary revenues of the Crown. William IV went farther, and surrendered not only the hereditary revenues but also certain miscellaneous and casual sources of revenue in return for a Civil List of £510,000 a year divided into five departments. To each of these a specific annual sum was assigned, and at the same time the Civil List was further relieved of certain extraneous charges which were properly national or parliamentary. The process was completed at the accession of Queen Victoria, when the Civil List was fixed at £385,000, distributed as follows: (1) Privy Purse, £60,000, (2) Household Salaries, &c., £131,260, (3) Royal Journeys, &c., £172,500, (4) Royal Bounty, £13,200, (5) Unappropriated, £8,040. At the same time opportunity was taken finally to transfer to Parliament all charges properly incident to the maintenance of the State¹ as distinct from the personal expenses of the Sovereign. Thus, as Erskine May well remarks,

'while the Civil List has been diminished in amount its relief from charges with which it had formerly been encumbered has

¹ The Crown still enjoys the revenues of the Duchies of Lancaster and Cornwall, the latter being part of the appanage of the Prince of Wales. The former now yields to the Crown a net revenue of £60,000 a year, the latter paid over to the Prince of Wales (for the year 1921) £33,736, the gross revenue for the same year amounting to £194,020.

placed it beyond the reach of misconstruction. The Crown repudiates the indirect influence exercised in former reigns and is free from imputations of corruptions. And the continual increase of the civil charges of the Government, which was formerly a reproach to the Crown, is now a matter for which the House of Commons is alone responsible. In this, as in other examples of constitutional progress, apparent encroachments upon the Crown have but added to its true dignity, and conciliated more than ever the confidence and affections of the people.¹

Edward
VII

The sum voted to Queen Victoria proved in the later years of the reign quite inadequate, despite the economical administration of the Household, to the maintenance of the royal state. The Civil List of King Edward VII was accordingly fixed, after a careful scrutiny at the hands of a Select Committee, at £470,000, to which were added grants of £20,000 for the Duke of Cornwall and York (now King George V), £10,000 for the Duchess, and an annuity of £18,000 for the joint line of the King's three daughters. Pensions of £25,000 a year were at the same time voted to the servants of the late Queen Victoria, and two grants of a contingent nature were provided for: an annuity of £70,000 to Queen Alexandra in the event of her surviving the King and of £30,000 to the Duchess of York in a similar contingency.

The
Crown
lands

This provision, as Sir Michael Hicks-Beach who was responsible for proposing it justly observed, was a moderate one. The nation may indeed be said to have made a very advantageous bargain with the Crown in view of the fact that the value of the hereditary revenues surrendered by the Crown increased during the reign of Queen Victoria from £245,000 to £452,000 a year. When George III came to the throne in 1760 the net revenue was only about £11,000.

The 'hereditary revenues' are derived mainly from Crown lands, including mines, and are managed by the Commissioners of Woods and Forests,² under the ex-officio

¹ *Constitutional History*, 1. 247

² Now 'Crown Lands.'

presidency of the Minister of Agriculture and Fisheries. Technically, they also include the hereditary Excise duties granted to Charles II, but long in abeyance, the compensation for wine licence revenue, and the hereditary post office revenue. For the year ended 31 March 1924 the net sum paid over by the Commissioners to the Exchequer amounted to no less than £920,000—a sum vastly in excess of the cost to the nation of the Monarchy and all its appurtenances.

On the death of King Edward VII a Select Committee was again appointed to consider the new Civil List. They satisfied themselves that 'the provision made in 1901 was adequate, but not more than adequate for the proper maintenance of the dignity of the Crown'. The Civil List was accordingly fixed at £470,000 as before, in addition to which provision was made for other members of the Royal family—including the annuity of £70,000 to the Queen Mother—amounting to £146,000 a year, £18,000 for pensions to the servants of the late King, and contingent grants as follows: to the Queen, should she survive the King, £70,000, to a possible Princess of Wales, £10,000, and £30,000, in the event of widowhood, for the King's younger sons, £10,000 a year each at majority and an additional £15,000 on marriage, and for the King's daughters, £6,000 a year each at majority or marriage. It was understood that Parliament should not be asked to provide for the children of the younger members of the Royal Family.

Civil List
of King
George V

Allowing, then, for every possible contingency the State, it will be seen, is amply secured against any deficit on the balance sheet of the monarchical establishment. It was indeed argued, in 1910, that the revenues of the two Duchies ought to be surrendered to the State. Mr Balfour, however, had no difficulty in proving that the Duchies were in a different category both from ordinary Crown lands and from the private property of the Sovereign, and it was generally agreed that the successful management of both Estates had completely cut the ground from

under the feet of those who desired a change in the historic manner of dealing with them.

The alteration in the mode of granting supplies to the Crown, the institution of a Civil List, was, however, only one of several indications of a profound change in the position of the Crown and the conception of Monarchy. With other indications and implications of that change the next chapter will deal.

XXIV THE PROBLEM OF THE EXECUTIVE (2)

Constitutional Monarchy

'A Constitutional Monarchy, according to the classic aphorism of M. Thiers is one in which the King reigns but does not govern. This highly artificial arrangement is commonly taken to be coeval with the Monarchy of England. It came into existence a century and a half ago. The first Constitutional king was George I.'—GORDWIN SMITH

'The direct power of the King of England is very considerable. His indirect and far more certain power is great indeed.'—BURKE

'The acts, the wishes, the example of the Sovereign in this country are a real power. An immense reverence and tender affection await upon the person of the one permanent and ever faithful guardian of the fundamental conditions of the Constitution.'—W. E. GLADSTONE (19th century)

'You cannot make a republic of the British Commonwealth of Nations.'—GENERAL J. E. SMUTS (20th century)

CONSTITUTIONAL Monarchy is one of those curious yet characteristic contradictions which are almost unintelligible save to the native born. The device is pre-eminently a product of political conditions which were for a long time peculiar to England. A Roman commentator upon the Teutonic polity was naturally struck by the limited authority of the 'Kings' of the German tribes.¹ We have long been taught to believe that the Saxon kingship, when it re-emerged on English soil, was similarly limited. A great English jurist of the thirteenth century—a period of advanced, not to say precocious, political theories—laid particular emphasis upon the limitations imposed upon the royal authority by the 'curia'.² Another great jurist, writing under the Lancastrian régime, taught his royal pupil, Henry VI, that a 'King of England cannot at his pleasure make any alterations in the laws of the land for the nature of his Government is not only legal but political'.³ What is more remarkable is that the judicious Hooker, writing at the apogee of the Tudor

Constitutional Monarchy

¹ Tacitus, *Germania*.

² Bracton (d. 1268).

³ Sir John Fortescue, *De Laudibus Legum Angliæ*. Fortescue's reference is to the analysis of Thomas Aquinas, *De Regimine Principum*, cf. *supra*, c. 11.

dictatorship, dared to remind his contemporaries that 'what power the King hath he hath it by law, the bounds and limits of it are known'.

The Stuarts, imbued with the Gallican rather than the Anglican doctrine of kingship, would have none of this illogical compromise. 'As for the absolute prerogative of the Crown, that is no subject for the tongue of a lawyer nor is it lawful to be disputed. It is atheism and blasphemy to dispute what God can do; good Christians content themselves with his will revealed in his word, so it is presumption and high contempt in a subject to dispute what a King can do, or say that a King cannot do this or that; but rest in that which is the King's revealed will in his law.' In this manner did James I address his Privy Council in 1616. Similarly he wrote in his *True Law of Free Monarchies*: 'A good King will frame all his actions according to the law, yet is he not bound thereto but of his own goodwill.' Unfortunately for his people and unfortunately for his House, James I brought to the task of ruling Puritan England the mind of a Scotch metaphysician and the traditions of French absolutism. The harvest was reaped in the Great Rebellion, and in the 'Revolution Settlement' of 1688.

To that settlement the advent of 'Constitutional Monarchy' is commonly ascribed. Yet the transition from personal to parliamentary government was, in fact, very far from complete under William III, or even under Queen Anne. The policy of England from 1689 to 1702 was the policy not of any Minister but of the King himself. King William undoubtedly found himself hampered, if not frustrated, by Parliament in some of his continental designs; but despite opposition he carried them through. Even Queen Anne, though not endowed with high capacity or strong character, imparted a distinct personal bias to the politics of her reign.

The
Hano-
verian
Dynasty A Constitutional monarch was defined by M. Thiers as one who reigns but does not govern. If we are to accept the aphorism as accurate we must date the transition from

personal to Constitutional rule from the next reign—that of George I

The accession of a King who, despite English blood, was in all essentials a foreigner, the prolonged ascendancy of a great Minister under whom the Cabinet for the first time assumed its modern form, and the development of Party organization in Parliament itself—all these contributed to the process

Recent historical research has considerably modified the previously accepted view that the effective power of the Crown was entirely eclipsed during the reigns of George I and George II, but such influence as the Crown exercised was felt more decisively in European than in domestic politics

With the accession of George III there was, however, a real revival of the monarchical idea. The young King came to the throne saturated with the principles of Bolingbroke's *Patriot King*, and determined, in his own person, to put them to the test of practical experiment. His own personality and the political circumstances of the hour were alike favourable to its success. In almost every way the young King stood in marked contrast to his immediate predecessors. The first of his dynasty who could be regarded as English, he rather overplayed the part, but he was simple, manly, and unaffected, his private life was above reproach, and his courage, both moral and physical, was magnificent. Intellectually he was below the average, with all the obstinacy of a rather stupid man, but his prejudices, which were numerous, fortunately coincided with those of the great mass of his subjects. And he had this further advantage. The political forces which during the last half-century had rivalled and even eclipsed that of the Crown were palpably weakening. Parliament was becoming every year more oligarchical both in temper and in composition. 'You have taught me', said George II to Pitt, 'to look elsewhere than to the House of Commons for the opinion of my people'. The lesson was not lost upon his grandson. Increasingly

oligarchical, Parliament was also increasingly disorganized. Since the fall of Walpole the great Whig party had rapidly disintegrated, it was broken up into factions and groups, and could offer little effective resistance to concentrated and sustained attacks. The King pressed home his advantage with unremitting industry and unflagging ardour. He worked like an election-agent, and dined on boiled mutton and turnips, in order that he might spend his enormous income in the purchase of the House of Commons. Burke probably exaggerated the cohesion of the 'King's friends',¹ but as to the reality and extent of the King's personal influence upon politics there can be no question. 'Every one', wrote Horace Walpole, 'ran to Court and voted for whatever the Court desired'. The personal influence of the King reached its zenith during the ministry of Lord North (1770-82). But even before the fall of his favourite Minister it was on the wane. The disasters of the American War, disasters laid, not wholly without justification, at the King's door, the acceptance of Mr Dunning's historic resolutions (1780),² above all, the ferment created by the King's personal interposition to defeat Fox's *India Bill*, seriously damaged the prestige of the Crown. Pitt came to the King's rescue in 1783, and five years later the hatred of opponents was changed to pity by the oncoming of insanity, which, fitful at first, became permanent in 1810.

George
IV and
William
IV

Under the Regency (1810-20) and the reign of George IV the popularity if not the power of the Crown markedly declined. George IV had more brains than his father, but much less conscience, and there can be no question that the scandals of his private life, combined with his obstinate resistance to all reform, seriously imperilled the existence of the Monarchy. On the Continent the restored Monarchies were on trial, even in England there were plenty of critics hostile to the institution. 'Oh, that the free would stamp the impious name of King into the dust'

¹ Cf. *Thoughts on the Causes of the Present Discontent*, passim.

² The first of them ran 'That the influence of the Crown has increased, is increasing, and ought to be diminished.'

was an aspersion which if infrequently uttered was widely entertained. Nothing but the unpopularity of the King could have conferred so much popularity upon his unhappy but undeserving Queen. Nevertheless it would be a mistake to underrate the practical influence of George IV upon politics. His alienation from the Whig friends of his youth kept the Tories in power in 1812, and throughout the whole of his regency and reign. Brougham asked the House of Commons to declare that the influence of the Crown was 'unnecessary for maintaining its constitutional prerogatives, destructive of the independence of Parliament and inconsistent with the well-governing of the realm'. It is significant that, unlike Dunning's resolutions of 1780, Brougham's was negatived by a large majority. But that the country would have tolerated a succession of George IV's is unlikely.

To George IV there succeeded in 1830 his brother, William IV, a sailor, bluff, genial, and kind-hearted, but entirely lacking in dignity, not to say in decorum. Under him the popularity of the Crown was restored, but its dignity was still further endangered.

Such was the situation which confronted the young Princess, called to the throne, as Queen Victoria, by her uncle's death in 1837. 'Since the century began', as one of her biographers pungently puts it, 'there had been three Kings of England of whom the first was long an imbecile, the second won the reputation of a profligate, and the third was regarded as little better than a buffoon'.¹ It was, therefore, the young Queen's first task to re-establish the Monarchy in the respect and affection of the people. More particularly was it her function to win the confidence of the middle classes who had lately, by the revolution of 1832, become supreme in English politics. For this task she was exceptionally qualified. 'It was', says Mr. Benson, 'supremely fortunate that the Queen by a providential gift of temperament thoroughly understood the middle class point of view'.² How well she succeeded in conciliat-

¹ Lee, *Queen Victoria*, p. 53.

² *Queen Victoria's Letters*, 1. 28.

ing to the Crown the affectionate regard of her people, the history of her long reign eloquently tells. But it would be misleading to suppose that her success was immediate, or, until the last two decades of her reign, complete. The cartoons of *Punch* reflect with singular accuracy the public sentiment. In the earlier half of the reign they are far from complimentary to the Queen, and to the Prince Consort; they are something less than respectful. In later years the tone changes. The change is clearly due to something more than length of days. The first impulse to it came perhaps from acknowledged misjudgement as to the Prince Consort.

We know him now all narrow jealousies
Are silent, and we see him as he moved,
How modest, kindly, all accomplish'd, wise,
With what sublime repression of himself,
And in what limits, and how tenderly,
Not swaying to this faction, or to that,
Not making his high place the lawless perch
Of wing'd ambitions, nor a vantage ground
For pleasure, but through all this tract of years
Wearing the white flower of a blameless life

It was shortly after the death of the Prince Consort that Mr. Walter Bagehot published his remarkable study on *The English Constitution*. His chapter on the Monarchy opens with the following words:

The Mid-
Victorian
Monarchy

'The use of the Queen in a dignified capacity is incalculable. Without her in England the present English Government would fail and pass away. Most people, when they read that the Queen walked on the slopes of Windsor—that the Prince of Wales went to the Derby, have imagined that too much thought and prominence were given to little things. But they have been in error, and it is nice to trace how the actions of a retired widow and an unemployed youth become of such importance.'

The passage is noticeable for several reasons. Bagehot was a genuine believer in the Monarchy as an institution and a sincere admirer of the Monarch, but his tone is obviously half-contemptuous and would now be generally

resented as barely decorous. For reasons which will be disclosed presently, the political position of the Crown is far better understood and more highly appreciated than was the case half a century ago. On the other hand Bagehot's analysis of the non-political functions of the Monarchy could even now hardly be improved upon. He describes the Crown as the pivot of the 'dignified part of the Constitution'. It is an 'intelligible' headpiece and consequently calls forth feelings towards the Government which no form of republican institutions can evoke. 'Royalty is a Government in which the attention of the nation is concentrated on one person doing interesting actions. A Republic is a Government in which that attention is divided between many who are all doing uninteresting actions'. Again 'the Monarchy strengthens our Government with the strength of religion', it appeals to sentiments which are not the less real and not the less strong because they are impalpable. It is valuable, also, as excluding competition for the headship of society, and above all as the guardian of the 'mystery' of the Constitution. It 'acts as a disguise', 'it enables our real rulers to change without heedless people knowing it'.

Passing to the political functions of the Crown, Bagehot, like most other commentators, confessed his inability to pierce the veil of the mystery in which the political action of the Sovereign is wisely enwrapped. 'We shall never know but when History is written our children may know what we owe to the Queen and Prince Albert'. Something of the debt is known. A portion of the veil has been already withdrawn. Materials for an historical judgement are rapidly accumulating. The *Lives* and *Letters* of leading statesmen of the Victorian era have disclosed much, the throwing open of archives has revealed much, the *Letters* of Queen Victoria herself, though edited with care and reticence, have perhaps done more than any other single publication to draw aside the veil. To what extent has the withdrawal rendered necessary a modification of Constitutional theory?

Political
functions
of the
Crown

Under a Constitution so flexible as our own much must evidently depend upon the personal equation. The character even of a strictly Constitutional Sovereign necessarily counts for a great deal. Year by year the character of Queen Victoria stands more clearly revealed as that of an exceptionally capable woman, strong of will, and passionately devoted to duty. Such a character, combined with an experience which, as the days of her long reign lengthened, far surpassed that of any Minister, must needs have left a profound impress upon the day-by-day working of the Constitution.

Apart from this somewhat elusive influence the English Sovereign possesses certain formal prerogatives which it may be convenient, at this point, to indicate.

Right of
Dissolu-
tion

The King has, firstly, the right of appeal from Parliament to the masters of Parliament, from his own advisers to the political Sovereign before the expression of whose deliberate will the legal Sovereign must bow. For, as Mr Dicey justly observed, 'the whole current of modern constitutional custom involves the admission that the final decision of every grave political question now belongs not to the House of Commons, but to the electors as the representatives of the nation'.¹ This right of dissolution the King would be compelled to exercise if he were unable to find a Ministry willing at once to accept responsibility for his acts and at the same time able to secure and retain the confidence of the House of Commons. But it is evidently a weapon which he would hesitate except in the last resort to employ. And for an obvious reason. An adverse verdict would create a situation almost intolerable. The position of the King would be that of a master who has given notice to servants and has been compelled by circumstances to retain them on their own terms. The older books taught that William IV ventured to employ this weapon against the Whigs in 1834, when, having dismissed the Melbourne Ministry, he dissolved Parliament in the hope of securing a majority for Sir Robert Peel.

¹ Letter to *The Times*, 15 Sept. 1913

The incident is capable of other explanations and the Melbourne Papers make it clear that the Prime Minister was, to say the least, a consenting party. Peel, however, when he took office, was under the impression, erroneously, as we now know, that Melbourne had been dismissed by the King, and he recognized that by taking office he had made himself responsible for the dismissal. 'I should', he said, 'by my acceptance of the office of First Minister become *technically if not morally* responsible for the dissolution of the preceding Government though I had not the remotest concern in it'.¹

That the Sovereign exercised this prerogative in 1784, 1801, 1807, 1832, and 1839 is undeniable. He was, in no dubious accents, invited to exercise it again in the autumn of 1913. The crisis over the Irish Home Rule Bill of 1912, and the operation of the Parliament Act (1911), had at that time become acute. Mr. George (now Viscount) Cave expressed the hope that, if Mr. Asquith's Ministry should prove obdurate in their refusal to lay the claims of Ulster before the electorate, the Sovereign would 'exercise his undoubted right and dissolve Parliament before the commencement of the next Session'.² Mr. Balfour appealed to the Government spontaneously to advise the course recommended by Mr. Cave.³ They declined to do so. The Crown could not, while retaining the Asquith Ministry, by an exercise of the prerogative have appealed over their heads to the electorate. That the Ministry would have tamely accepted such an affront, or the Crown have offered it, is unthinkable. It would, however, have been within the undoubted right of the Sovereign to have sought the advice of an alternative Ministry, and in the event, certain under the circumstances, of their immediate defeat in the House of Commons, to have dissolved Parliament. 'The discretionary power of the Crown', writes Dicey, 'occasionally may be, and according to constitutional precedents sometimes ought to be, used to

The crisis
of 1913

¹ Peel, *Memoirs*, II, 31.

² *The Times*, 8 Sept. 1913.

³ *The Times*, 10 Sept. 1913.

strip an existing House of Commons of its authority'. But there is no disguising the fact that if the electorate had refused support to the alternative Ministry, the King would have found himself in a position of some embarrassment. He would, as already stated, have been compelled by the electors to take back a body of servants whom *proprio motu* he had dismissed. Thus, as so frequently happens under our unwritten Constitution, the matter was, in practice, reduced from one of constitutional Convention to one of political expediency. A course sanctioned by law and precedent may well be injudicious. Of its wisdom the alternative Ministry must, in the last resort, judge.

Refusal
of dissolution

Another constitutional right, similar to but quite distinct from the former, belongs unquestionably to the King. He is entitled to appeal from his Ministers to Parliament. This is in effect to refuse to an existing Ministry a dissolution. Such cases have frequently arisen in the self-governing Dominions, though the action of the governor in refusing, and sometimes indeed in granting, a dissolution has not escaped criticism. In Australia there were no fewer than three refusals by Colonial governors in one year.¹

The question of the exercise of this prerogative at home was raised acutely in December 1923, when, as a result of the General Election, no one of the three parties found itself in an absolute majority in the House of Commons. Had Mr Baldwin, before resigning office, or Mr Macdonald after accepting it, been so ill advised as to ask for a dissolution of Parliament, the King might certainly have declined to assent to it. The constitutional doctrine on this point was stated at the time by Mr Asquith in terms as lucid as they are unequivocal.

'The dissolution of Parliament', he said, 'is in this country one of the prerogatives of the Crown. It is not a mere feudal

¹ *Law of the Constitution*, p. 360.

² For a full discussion of this question see A. B. Keith, *Responsible Government in the Dominions*, 1: 180 seq. The point has again (July 1926) been raised, in an acute form, by the action of Lord Byng of Vimy, Governor-General of Canada, whose attitude seems to have been entirely 'correct'.

survival, but it is part, and I think a useful part, of our constitutional system for which there is no counterpart in any other country, such, for instance, as the United States of America. It does not mean that the Crown should act arbitrarily and without the advice of responsible Ministers, but it does mean that the Crown is not bound to take the advice of a particular Minister to put its subjects to the tumult and turmoil of a series of General Elections so long as it can find other Ministers who are prepared to give it a trial. The notion that a Minister—a Minister who cannot command a majority in the House of Commons . . . in those circumstances is invested with the right to demand a dissolution is as subversive of constitutional usage as it would, in my opinion, be pernicious to the general and paramount interests of the nation at large.' ¹

It will not escape notice that Mr. Asquith made the exercise of this prerogative dependent upon the advice of responsible Ministers ; but in seeking that advice the King has the right to act on his own initiative, and in the case under notice he might well have thought it proper to do so. In the particular case Mr. Asquith, after enunciating the constitutional doctrine in terms of unimpeachable accuracy, himself rendered the exercise of the prerogative unnecessary by helping the Socialist leader to defeat the Conservative Ministry in the House of Commons, and by sustaining him for a few months in office, if not in power.

There is yet another right incontestably appertaining to the Crown closely connected with the above. It is the right of selecting his chief adviser, the Minister who is now officially, as well as popularly, styled Prime Minister. The King's choice is, as a rule, very narrowly limited in practice, but it is not denied, by any authority entitled to respect, that, within such limits, the discretion permitted to the Crown is a real one.

The appointment of the young William Pitt to the premiership in 1783 was the act of the King, and of the King alone. So also was the dismissal of the Fox-North Coalition Ministry. Nothing, indeed, was omitted which could add to the ignominy of their dismissal or could

Selector
of Prime
Minister

George
III and
the
younger
Pitt

¹ *The Times*, 19 Dec. 1923.

emphasize the personal responsibility of the King Lord North and Mr Fox were commanded to return their seals by their under-secretaries as a personal interview would be disagreeable to his Majesty Earl Temple, who had acted as intermediary between the King and the House of Lords, and had been the chief instrument of the Crown in effecting the defeat of the Ministry, was entrusted with the seals for the purpose of formally dismissing the outgoing Ministers.

The King's right to select his own Minister was hotly challenged at the time. The House of Commons accepted without a division a resolution moved by Mr Coke of Norfolk 'That the continuance of the present Ministers in their offices is an obstacle to the formation of such an administration as may enjoy the confidence of this House.' Pitt, however, stoutly stood his ground. He refused to resign, he refused to advise a dissolution of Parliament, he denied that the appointment or removal of Ministers rested with the House of Commons, and boldly claimed that Ministers appointed by the Crown were entitled to a fair trial. The young Minister's patience and tenacity gradually wore down the Opposition, and when, after three months of guerrilla warfare in the House of Commons (December 1783 to March 1784) he at last dissolved Parliament, the electorate emphatically endorsed his contention and approved the tactics by which he had maintained it. Of Pitt's opponents upwards of one hundred and sixty lost their seats and the young Minister was carried back to power at the head of a triumphant majority.

The
Royal
Prerogative

This result was, however, a triumph for the King not less than for the Minister. George III had, indeed, staked far more upon the issue of the election than had Pitt. Had it gone against him the position of the Crown would certainly have been humiliating and might easily have become precarious. Many things contributed to the success of the venture: dislike of the Coalition, loyalty to the memory of Chatham and admiration for the spirit

displayed by his son, apprehensions of an attack on 'property' suggested by the proposals of Fox's India Bill, Pitt's magnanimity in regard to the Clerkship of the Pells, his disinterested zeal for public economy, the stupid tactics of the Opposition, their oligarchical temper, so sharply contrasted with the popular instincts of Pitt, their apparent mistrust even of the limited electorate of the eighteenth century, above all, a genuine enthusiasm for the King and his gallant champion. But the completeness of the King's triumph should not blind us to the serious risks involved in the course on which he had chosen to embark. Failure would plainly have weakened, perhaps beyond the possibility of repair, the position of the Crown, it might even have precipitated a crisis parallel with that which occurred five years later in France.

As things were, the outbreak of the Revolution in France served to emphasize the victory won by George III and Pitt. The Napoleonic wars firmly consolidated it. So firmly, indeed, that in the midst of those wars George III felt strong enough, if not to dismiss his ally, at least to dispense with services which he could retain only by assenting to the removal of the last remnants of the disabilities under which the Roman Catholics still laboured. Rather than break faith with the Irish Roman Catholics Pitt resigned in 1801, but so strong was the position of the Crown that when the renewal of the war compelled his return to office, he was constrained to abandon the Catholic cause. The refusal of Grenville and his colleagues in the Ministry of 'All the Talents' to do likewise led to their fall in 1807. That George III and his eldest son reflected on this question the opinions of the great mass of their people is probably true, but it is indicative of the power of the Crown that two such kings should have been able successfully to withstand such Ministers as Pitt, Castlereagh, and Canning.

The long premiership of Lord Liverpool relieved George IV of any difficulties with his Ministers or with

William
IV and
Lord Mel-
bourne

Parliament during the greater part of his regency, and nearly the whole of his reign. None could be appichended with the Duke of Wellington in office. William IV was credited with 'popular' sympathies, and the Whig Ministers publicly announced that in promoting the cause of parliamentary reform they enjoyed not merely the confidence but the support of the new King. By 1834, however, the King had become mistrustful of the intentions of Lord Grey's Ministry in regard to the Irish Church. The resignation of Lord Stanley, Sir James Graham, the Duke of Richmond, and Lord Ripon intensified his apprehensions (May), the resignation of Lord Grey and the succession of Lord Melbourne (July) did nothing to remove them, and on 15 November the King suddenly dismissed the Ministry and sent for Sir Robert Peel. To this incident and its interpretation reference has already been made. That Lord Melbourne was himself at least a consenting party is now clear, yet Erskine May is right in saying that 'all the usual grounds for dismissing a Ministry were wanting', and that 'the act of the King bore too much the impress of his personal will, and too little of those reasons of State policy by which it should have been prompted'.¹

Sir Robert Peel did indeed assume, in due constitutional form, entire responsibility for the action of the King.² But neither this avowal nor the immediate dissolution of Parliament which the new Minister was constrained to advise availed to extricate the King from the embarrassment into which he was plunged by his precipitate action. Peel materially improved his parliamentary position, but the Whigs were still in a large majority, and in April 1835 Lord Melbourne returned to office.

Queen
Victoria
and her
Ministers

Could Queen Victoria have had her way she would have retained him permanently. Nothing could have exceeded the cordiality of the relations which from the first subsisted between the young Queen and the man whom she treated as a political godfather. His resignation in 1839 caused

¹ *Op. cit.* 1, 121, 122

² *Hansard*, 3rd Ser., cxcvi, 216, 223

her deep pain, which she was at no trouble to conceal either from Lord Melbourne or from the 'cold odd man' called to succeed him. The Queen announced her intention 'to prove her great fairness to her new Government', but when Peel insisted, with perfect constitutional propriety, that the highest household offices, female no less than male, must change with the Government, the Queen flatly declined to part with her ladies. Peel would not give way, and Melbourne, to the Queen's delight, came back. Sixty years later the Queen confessed to Sir Arthur Bigge (afterwards Lord Stamfordham) that she had doubts as to the propriety of her conduct in regard to the Bedchamber Question. 'I was very young then, and perhaps I should act differently if it was all to be done again.' Melbourne finally resigned in 1841, having, in the words of Wellington, taught the Queen 'to preside over the destinies of this great country'. Peel was not only forgiven, but was admitted to the fullest confidence and friendship of the Queen and the Prince Consort.

Thus, when he in turn was compelled to resign in 1846, the Queen wrote 'expressing her *deep* concern at losing his service, which she regrets as much for the country as for herself and the Prince. In whatever position', she continued, 'Sir Robert Peel may be, we shall ever look on him as a kind and true friend, and ever have the greatest esteem and regard for him as a Minister and as a private individual.'

Such letters—and they abound in the collection edited by Lord Esher and Mr A. C. Benson—suffice to prove not only the warmth of the Queen's feelings, but the close and continuous interest she took in the Government of her kingdom. Do they afford proof of anything more? Is it possible to draw from those or other sources any inference as to the actual political power of the Crown during Queen Victoria's reign? Was it, on the whole, impaired or increased between 1837 and 1901? A recent critic, while admitting that by the end of the reign the prestige of the Sovereign had enormously grown, maintains that 'the

The position of the Crown in the Victorian era

power of the Sovereign had appreciably diminished', and, indeed, goes so far as to assert that 'the Crown was weaker than at any other time in English history'.¹ Will this proposition command assent? The extreme flexibility of the English Constitution, still more its 'uncertainty', render it difficult to answer this question with complete assurance. This much, however, is indisputable that the English Constitution still affords to the Sovereign frequent opportunities for exerting an influence upon the course of political events.

Kings are mortal, but they are not ordinary mortals, a glamour attaches to their position and person which even the stoutest and most self-assured democrats find irresistible. The sentiment thus inspired may be unworthy or the reverse, but it is idle to deny that it exists, or that it gives the Sovereign an initial advantage in dealing with any Minister, however powerful.

Queen
Victoria
and Lord
Palmer-
ston

Bagehot enumerated three rights possessed by the King: 'the right to be consulted, the right to encourage, the right to warn'. 'A King of great sense and sagacity would want', he adds, 'no other'. The *Letters* of Queen Victoria afford innumerable illustrations of her insistence upon these rights. It was the violation of her right to be consulted which brought Lord Palmerston into trouble in 1851, though his indiscretion in regard to the *coup d'état* would hardly have led to dismissal had he not already forfeited the confidence of the Queen.

'The Queen', so ran the famous memorandum of 1850, 'requires, first, that Lord Palmerston will distinctly state what he proposes in a given case, in order that the Queen may know as distinctly to what she is giving her royal sanction. Secondly, having once given her sanction to such a measure that it be not arbitrarily altered or modified by the Minister. Such an act she must consider as failing in sincerity towards the Crown, and justly to be visited by the exercise of her constitutional right of dismissing that Minister. She expects to be kept informed of what passes between him and foreign ministers before important

¹ Stachey, *Queen Victoria*, pp. 301, 303.

decisions are taken based upon that intercourse, to receive the foreign despatches in good time, and to have the drafts for her approval sent to her in sufficient time to make herself acquainted with their contents before they must be sent off'

The demand, though explicit, was entirely reasonable, and Lord Palmerston justly suffered a temporary humiliation for the lack of consideration he displayed towards the Sovereign. That he had a strong personal regard for the Queen, and a high respect for her intellect, we have his own testimony to prove but he was inclined to treat her as an elderly family solicitor occasionally treats a young lady client 'of course, my dear young lady, you can read these documents if you like, but you won't understand them if you do, and you will save yourself trouble and me time if you sign at once' The Queen, as is clear from her correspondence, strongly resented this attitude on the part of her Minister, and properly she enforced her claim to be consulted.

Her right to encourage was perpetually exercised. Her letters to Peel in the midst of the struggle for the repeal of the Corn Laws afford one of many illustrations. Thus in January 1846 the Queen wrote to express her 'great satisfaction' at Peel's success in persuading his colleagues to accept the principle of his policy 'feeling certain that what was so just and wise must succeed'. On 4 February she wrote again saying 'she is sure that Sir Robert will be rewarded in the end by the gratitude of the country. This will make up for the abuse he has to endure from so many of his party'. On the 17th Prince Albert writes to Peel 'allow me to tell you with how much delight I have read your long speech of yesterday. It cannot fail to produce a great effect, even upon a party which is determined not to listen to the voice of reason'. This is followed on the next day by a note from the Queen herself, enclosing an equally flattering one from the Queen Dowager to her daughter. 'The Queen must write a line to Sir Robert Peel to say how much she admired his speech'. Such letters and many like them, attest the meticulous attention

Queen
Victoria
and Peel

bestowed by the Queen upon passing events in the sphere of domestic policy. Not less close and continuous is her interest in foreign policy; and not less marked is the encouragement given to her Ministers during periods of national stress, such as the Crimean War. No detail is too small or unimportant to engage the personal attention of the Sovereign: the supply of ammunition or transport accessories, the exact disposition of the armaments, hospital comforts for the sick or wounded, and so forth. On these points and such as these she inquires of the Secretary for War. To the Prime Minister, Lord John Russell, she writes to express 'her sense of the imperative importance of the Cabinet being *united*, of one mind, at this moment, and not to let it *appear* that there are differences of opinion within it.'

Queen
Victoria
and Lord
Derby

But if she was generally ready to encourage, she did not hesitate to reproach. Thus in 1858 she wrote to Lord Derby a letter which by itself would suffice to prove how justly tenacious she was of the royal prerogative: 'The Queen', she writes, 'was shocked to find that in several important points her Government have surrendered the prerogative of the Crown. . . . The Queen must remind Lord Derby that it is to him, as the head of the Government, that she looks for the protection of those prerogatives which form an integral part of the Constitution.' With Lord Palmerston she was even more seriously angry, in the midst of the Mutiny crisis. In her opinion—and she was undeniably right—Palmerston underrated the gravity of the situation, and to the Queen, far more than to the Minister, the nation owed the timely dispatch of adequate reinforcements.

The
Prince
Consort
and the
Trent
affair

Illustrations of the judicious and opportune intervention of the Sovereign might be multiplied almost indefinitely. That on some occasions the Queen's action was inspired by the Prince Consort is an indubitable fact, but, in this connexion, is nothing to the point. One notable instance of the Prince's diplomatic tact may, however, be mentioned. When the Prince was on his death-bed in 1861, England and America came within measurable distance of war over

the *Trent* affair. Opinion in England was seriously aroused about the detention of Shdell and Mason, and Lord John Russell, accurately interpreting that opinion, is depicted by *Punch* as squaring up to President Lincoln with the words 'give them up or fight'. Lord John Russell's dispatch sent down for the approval of the Queen is said to have been conceived somewhat in this tone. The Prince's emendations, without in the least diminishing its firmness, afforded Lincoln a golden bridge for retreat from an indefensible position. Lincoln had the sense and courage to cross it, the situation was saved, and war was averted—averted, no one can doubt, by the fact that the Minister's draft dispatch had to undergo the scrutiny of a royal diplomatist whose tact and judgement were ripened by a continuous experience of affairs, such as no Minister can possibly, under our party system, hope to enjoy. The Sovereign is in fact, as regards Foreign affairs, a permanent Civil Servant with opportunities for acquiring a knowledge of things, and more particularly of men, such as no Civil Servant, immersed in the routine of a great office, and no diplomatist, touching affairs only at a single point, ever has or can acquire.

No English Sovereign ever exemplified this truth better than King Edward VII. As Prince of Wales he had been jealously excluded by Queen Victoria from all official knowledge of affairs of State. Not until 1895 was he even entrusted with the 'Cabinet Key' which gives access to the boxes which are circulated among Cabinet Ministers and contain the latest information on current affairs. Nevertheless he made the most of all the opportunities given to him by his position, and still more by a singularly affable and attractive personality. He sedulously cultivated the acquaintance of every ruler in Europe, and of statesmen and publicists belonging to all parties. He was no student in the narrower sense, but he made a systematic habit of picking every brain worth picking, and consequently was cognizant of every current and cross current of opinion in Europe.

King
Edward
VII

Both before and after his accession to the throne King Edward took his holidays on the Continent. Connected by ties of blood and friendship with most of the continental dynasties, the appellation of *L'Oncle de l'Europe* at once expressed a literal truth and indicated a political fact of considerable significance. Lisbon, Rome, Paris, Athens, Madrid, Copenhagen, Stockholm, Christiania were visited in turn. His first ceremonial visit as King to Paris in 1903 was epoch-making. Anglo-French relations had not for many years been cordial, and at times had been severely strained, and the King's reception in Paris, though correct, was chilly. But in a memorable speech he gave public expression to his affection for the beautiful capital of France and stated his conviction that 'the days of hostility between the two countries are happily at an end'. Before the close of his brief visit he had completely captivated the heart of the citizens of Paris, and indeed of France.

To ascribe to King Edward the origin of the Anglo-French Entente is not, of course, accurate. M. Paul Cambon, the French Ambassador in London, M. Delcassé, and Lord Lansdowne must share with him the credit, though, in truth, the part played by individuals was secondary. The compelling factor in the evolution of the 'Triple Entente' was the pre-existing 'Triple Alliance'. Yet the influence of King Edward was by no means

If, however, we deny to him the whole credit for the Anglo-French Entente, we must not ascribe to him the responsibility for the 'encirclement' of Germany. If, indeed, Germany was 'encircled', the circle was drawn by her own diplomacy. In July 1904 Great Britain concluded with Germany an Arbitration Treaty, parallel in terms with that concluded with France in the previous year, and in the same summer King Edward, accompanied by the First Lord of the Admiralty, visited the Kaiser at Kiel. Thereafter, scarcely a year passed without an interchange of visits between the English and German Courts, and

thrice during his short reign did King Edward visit the aged Austrian Emperor, Francis Joseph. Thus did King Edward labour in the cause of international peace.

Nevertheless he discerned—none more clearly—the clouds on the horizon. Lord Redesdale and Lord Morley of Blackburn alike testify to the anxiety manifested by the King on receipt of the news that Austria had annexed the Provinces of Bosnia and the Herzegovina (1908).¹ His intimate knowledge of continental politics enabled him to perceive, more clearly than some of his Ministers, the sinister implications of the events of that most fateful year. Yet he strove, during the brief remainder of his reign, though with dwindling hopes of success, to preserve the peace of Europe and the world.

The time has not yet come for a full disclosure of the part King Edward played as a peacemaker, nor for a precise analysis of his influence upon the policy of his reign. But there is no question that in the domain of foreign affairs it was at once considerable and beneficent.

Not only, however, in foreign affairs is there room for the exercise of diplomatic tact on the part of the Sovereign. On two notable occasions in the latter part of her reign Queen Victoria is known to have intervened with success to avert a conflict between the two Houses of the Legislature on questions of eminent importance. The first was in regard to the disestablishment and disendowment of the Irish Church in 1869. The Queen's personal sentiments in this matter were opposed to those of her Ministers, but never for an instant did she deflect her course from that prescribed to the most rigid of 'constitutional' Sovereigns: Loyalty to her Ministers, perfect appreciation of the bearings of the political situation, realization of the fact that the House of Commons in passing the Bill by large majorities reflected the sentiments of the Constituencies, above all, perhaps, anxiety to avert a conflict *à outrance* between the two Houses,—all these things combined to

Queen
Victoria
and the
Irish
Church
Question

¹ Cf. Lord Redesdale, *Memories*, i. 178, and *The Recollections of John, Viscount Morley*, ii. 277.

induce the Queen to mediate between the Government and their opponents in the House of Lords. With this object General Grey, the Queen's secretary, addressed the following letter to Archbishop Tait and sent a copy to the Prime Minister

' Mr Gladstone is not ignorant (indeed the Queen has never concealed her feeling on the subject), how deeply her Majesty deploras the necessity, under which he conceived himself to be, of raising the question as he has done, or of the apprehensions of which she cannot divest herself, as to the possible consequences of the measure which he has introduced. These apprehensions, her Majesty is bound to say, still exist in full force, but considering the circumstances under which the measure has come to the House of Lords, the Queen cannot regard without the greatest alarm the probable effect of its absolute rejection in that house. Carried, as it has been, by an overwhelming and steady majority through a House of Commons, chosen expressly to speak the feeling of the country on the question, there seems no reason to believe that any fresh appeal to the people would lead to a different result. The rejection serves to bring the two Houses into collision, and to prolong a dangerous agitation on the subject.'

The Peers passed the second reading by a majority of thirty-three, and Mr Gladstone gratefully acknowledged, as well he might, the efficacy of her Majesty's 'wise counsels'. His own feelings are vividly depicted in a letter to the Queen

' Mr Gladstone would in vain strive to express to your Majesty the relief, thankfulness, and satisfaction with which he contemplates not only the probable passing of what many believe to be a beneficent and necessary measure, but the undoubted signal blessing of an escape from a formidable constitutional conflict.'¹

Queen
Victoria
and the
Parliamentary
Reform
Bills of

Not less memorable and not less effective was the Queen's intervention in regard to another threatened conflict between Lords and Commons in 1884. The circumstances are relatively recent and need no elaborate

¹ *Morley, Life*, II 278

rehearsal Of all the Reform Bills of the nineteenth century that of 1884 was the largest in its scope The Lords were determined, and most properly, to refuse their assent to so wide an extension of the electoral franchise, unless they were previously reassured as to the lines of the coming Bill for the redistribution of Seats The case was eminently one for compromise, but an impartial arbitrator was needed to bring the parties together The invaluable intermediary was found through the good offices of the Crown, both sides were exhorted to moderation, and in the event Mr Gladstone had every reason 'to tender his grateful thanks to your Majesty for the wise, gracious, and steady influence on your Majesty's part, which has so powerfully contributed to bring about this accommodation, and to avert a serious crisis of affairs' The delicate tact demanded from a conciliator in matters of such high moment it requires little imagination to conceive But it can be fully appreciated only on perusal of the story in detail¹

It is not likely that we shall ever be able to define with precision the sphere within which the personal will of the Sovereign operates, but the 'materials' now rapidly accumulating do enable us to perceive that a 'Constitutional King' is not synonymous with *un roi fainéant*, that despite the evolution of the Cabinet system, despite the responsibility of Ministers and the irresponsibility of the Sovereign, despite the dominance of Party and the rigid non-partisanship of the Crown, there does remain to the latter a sphere of political action which, if wisely left undefined, nevertheless has been and may be of incomparable value to the nation as a whole On this point the testimony of Mr Gladstone is at once eloquent, emphatic, and conclusive, and justifies quotation in full

'Although the admirable arrangements of the Constitution have now completely shielded the Sovereign from personal responsibility they have left ample scope for the exercise of

¹ For which cf. Morley's *Gladstone*, vol. III, pp. 129-39, and Lang, *Life of Lord Idlesleigh* (Popular edition), p. 352

a direct and personal influence in the whole work of government. The amount of that influence must vary greatly according to character, to capacity, to experience in affairs, to tact in the application of a pressure which never is to be carried to extremes, to patience in keeping up the continuity of a multitudinous supervision, and, lastly, to close presence at the seat of government, for, in many of its necessary operations, time is the most essential of all elements and the most scarce. Subject to the range of these variations, the Sovereign, as compared with her Ministers, has, because she is the Sovereign, the advantages of long experience, wide survey, elevated position, and entire disconnexion from the bias of party. Further, personal and domestic relations with the ruling families abroad give openings, in delicate cases, for saying more, and saying it at once more gently and more efficaciously, than could be ventured in the more formal correspondence, and ruder contacts, of Governments. There is not a doubt that the aggregate of direct influence normally exercised by the Sovereign upon the counsels and proceedings of her Ministers is considerable in amount, tends to permanence and solidity of action, and confers much benefit on the country without in the smallest degree relieving the advisers of the Crown from their undivided responsibility. The acts, the wishes, the example of the Sovereign in this country are a real power. An immense reverence and a tender affection await upon the person of the one permanent and ever faithful guardian of the fundamental conditions of the Constitution. She is the symbol of law, she is by law, and setting apart the metaphysics, and the abnormal incidents of revolution, the source of power. Parliaments and Ministers pass, but she abides in lifelong duty, and she is to them as the oak in the forest is to the annual harvest in the field.¹

This testimony is the more remarkable as coming from one who was generally accounted to be no courtier. It lacks, therefore, neither authority nor impartiality.

Formal
Powers of
the
Crown

Two further points demand in this connexion brief notice. Whatever the actual power of the Crown in politics there can be no question that its formal executive powers have in these last years enormously increased.

¹ *Gleanings*, I. 41-3

This has been due to several causes . partly, to the abnormal legislative activity of Parliament, partly to multiplication of the functions and responsibilities of the State, and partly to the increasing tendency to legislation by delegation Acts of Parliament are now frequently mere *cadres*, which are vivified, by the consent and intention of Parliament, by the several administrative departments Thus, as an acute American critic of English Institutions has pointed out, has very largely increased the formal executive powers of the Crown ¹

Equally indisputable and much more significant is the increased importance of the Crown as the centre and symbol of Imperial unity If to the term 'political' we give the circumscribed connotation common to the publicists of the last generation, we might be disposed to agree with President Lowell that 'as a political organ it [the Crown] has receded into the background' ² Queen Victoria came to the throne at a time when the weary Titan groaned beneath the weight of Imperial responsibilities which were light compared to those of to-day, when men asked queulously how long 'those wretched Colonies' were 'to hang like a millstone round our necks', while as yet the imagination of the English people was wholly untouched by the idea of Imperial solidarity To them, therefore, 'political' activity could signify nothing but pre-occupation with the permutations of party government at home

The
Crown
and the
Empire

In the last eighty years, however, ideas have changed in this matter with amazing rapidity Our conception of the 'political' sphere has broadened The political activities and influence of a British ruler are now bounded only by the globe The Empire inherited by King George V is a totally different thing from that which William IV handed on to Queen Victoria The actual centre of political gravity is shifting, the domestic politics of Great Britain, even her European relations, are shrinking into true perspective, and, as a result, a new

¹ Lowell, *Government of England*

² *Ibid.*, vol 1, p 49

sphere of influence and activity is opening out before the occupant of the Throne

The loyal to their Crown
Are loyal to their own fair sons who love
Our ocean Empire with her boundless home,
For ever broadening England, and her throne
In one vast orient, and one isle, one isle
That knows not her own Greatness

The obverse is equally true. The loyalty of the overseas Dominions is evoked not by an institution but by a person,¹ not by a Parliament, imperial only in name, but by an Emperor-King. In a word, the Crown has become, in an especial sense, the guardian and embodiment of a new idea—the sentiment of Imperial Unity.

To this development the Great War contributed not a little.

The Great
War

The deep reality of the sentiment which on 11 November 1918 brought the surging multitudes, as though drawn by a common and irresistible impulse, to the gates of Buckingham Palace, cannot be missed by the least reflective commentator on contemporary events. From August 1914 to November 1918 the King was in an especial sense and to an extraordinary degree the embodiment of the spirit of the nation and of the Empire. If the hosts which went forth, not from Great Britain only but from every land where the British flag flies, were in truth embarking on a crusade for humanity, they also fought for King and Country. Nor did King George ever fail, during those anxious years, to rise to the height of a great opportunity, with the result that, despite the fact that in Central and Eastern Europe many thrones were overturned, the British Crown emerged from the ordeal established more firmly than ever as the symbol of national unity.

And not less as the symbol of Imperial unity. The war did more than many years of peace to intensify and solidify

¹ Cf. *The Times*, Dec. 28, 1910. 'The settled attitude of politicians in all the Great Dominions nowadays is to profess complete indifference to the fortunes of parties in England, and on the other hand to redouble their professions of devotion to the Crown.'

this sentiment General Smuts, speaking in London in 1917, specially emphasized it. Belonging himself to the autonomist or nationalist school of colonial statesmen, he, nevertheless, recognized the supreme importance of the 'golden link' of the Crown.

'How', he pertinently asked, 'are you going to keep this Commonwealth of nations together?' If there is to be this full development towards a more varied and richer life among our nations, how are you going to keep them together? It seems to me that there are two potent factors that you must rely upon for the future. The first is your hereditary Kingship, the other is our Conference system. I have seen some speculations recently in the newspapers about the position of the Kingship in this country, speculations by people who, I am sure, have not thought of the wider issues that are at stake. You cannot make a republic of the British Commonwealth of Nations.'

Arguing that the election of a President for the Empire would present an insoluble problem, General Smuts continued: 'The theory of the Constitution is that the King is not your King, but the King of all of us, ruling over every part of the whole Commonwealth of nations, and if his place should be taken by anybody else, that somebody will have to be elected under a process which it will pass the wit of man to devise.'¹ This is the language not of sentiment but of common sense. The abolition of the Monarchy would mean the dissolution of the Empire. It is arguable that in each component State of the Commonwealth an elected President might perform efficiently many of the functions now assigned to the Crown, but a President of the whole Commonwealth, still more of the vast and varied Empire, of which the Commonwealth forms only a part, is unimaginable. In this connexion no small significance attaches to the repeated tours made by the Heir Apparent to the great Dominions, to India and to other portions of the Empire. The Prince of Wales has proved himself to be a particularly efficient 'ambassador of Empire', acquiring knowledge, at first hand, of the problems which await

¹ *War Time Speeches*, p. 34.

solution in the several parts of the King's dominions, and making personal acquaintance with many thousands of his father's subjects.

If, then, there has been during the last half-century some contraction in the influence of the Crown upon domestic politics, the contraction in one direction has been more than compensated by expansion in another, a wider and an even more important sphere.

XXV THE PROBLEM OF THE EXECUTIVE (3)

The Parliamentary Executive Cabinet Government The Evolution of the Prime Minister

'The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers. No doubt by the traditional theory, as it exists in all the books, the goodness of our constitution consists in the entire separation of the legislative and executive authorities, but in truth its merit consists in their singular approximation. The connecting link is the *Cabinet*. By that new word we mean a committee of the legislative body selected to be the executive body'—BAGEHOT (1863)

'While every act of state is done in the name of the Crown, the real executive Government of England is the Cabinet. No one really supposes that there is not a sphere, though a vaguely defined sphere, in which the personal will of the Queen has under the Constitution very considerable influence'—A. V. DICEY (1885)

'No Minister of State shall hold office for a longer period than three months unless he is or becomes a Senator or a member of the House of Representatives'—AUSTRALIAN COMMONWEALTH ACT, Sect. 64

'No person holding any office under the United States shall be a member of either house during his continuance in office'—CONSTITUTION OF THE UNITED STATES I, Sect. 6

FOR the ancient world the choice of an Executive lay between a Monarch, more or less autocratic, an Oligarchy, aristocratic or commercial, and a Democracy, in which the citizens filled in turns the executive offices. In the modern State choice must virtually be made between an Executive of the parliamentary type, first evolved in England, and one of the Presidential type as exemplified in the Constitution of the United States of America.

A Parliamentary Executive is compatible either with a Monarchy, provided the latter be 'Constitutional' or with a unitary Republic such as that established in France since 1875. Whether the Cabinet system is consistent with a Federal Republic, or indeed with Federalism at all, is a question which will demand consideration later on. Similarly, the Presidential type may coexist either with

Alternative
Forms of
Executive

Royal autocracy, as in the German Empire of 1871, or with a democratic republic.

The present chapter is concerned with the characteristics and implications of a Parliamentary Executive, and particularly with that type of it which coexists with 'Constitutional' Monarchy. Of that curious but characteristic compromise the Cabinet system is the natural if not the necessary complement.

We have already followed the process by which the King, who was for many centuries the pivot of the constitutional machine and the real ruler of the realm, has been brought into political dependence upon Parliament, and more particularly upon the House of Commons; or, to use more technical language, the process by which the Executive has been subordinated to the Legislature. But of all the devices employed to effect this virtual transference of supreme political authority the most important remains to be analysed. It is found in the evolution of a *Cabinet Council* under the presidency of a Prime Minister.

Cabinet
Govern-
ment

The Cabinet and the Prime Minister are of all English political institutions the most characteristic. Taken together they are the pivot round which the whole political machine practically revolves; yet neither is in terms known to the law.

It was shown in the last chapter that the legal powers of the Crown were not seriously curtailed by the Revolution Settlement of 1688-1701. We might have gone farther and shown that those powers have on the contrary been enormously extended by the rapid increase in the functions of government and by the delegation of subordinate law-making powers to various administrative bodies (such as the Home Office, the Ministry of Health, and the Board of Trade) which act in the name of the Crown. But while the *powers* of the Crown have been increased, the *power* of the Crown has been rigorously curtailed. And the apparent paradox is to be explained by the development of an administrative system, the chief officials of which, while nominally the servants of the King, are in reality politically

responsible to Parliament. Of these officials the most important have come to form what is popularly known as the Cabinet Council or the *Cabinet*.

What is the Cabinet? It is sometimes described as a Committee of the Legislature (e.g. by Bagehot), sometimes as a Committee of the Privy Council (e.g. by Hearn). Neither description is strictly accurate, but it is sufficiently true to say that all Cabinet Ministers must be members of one or other House of the Legislature, and must be members of His Majesty's Privy Council.¹ It is further true that to the ancient Privy Council we must look for the origin of the modern Cabinet.

The King's Council has, under various names,² a continuous history from Norman days to our own. In the early fifteenth century it was, as we have seen, subjected, with disastrous results, to Parliament. In the sixteenth century it became the all-powerful instrument of Tudor government. Under the Stuarts this Privy Council became utterly unwieldy in size, and consequently useless for administrative purposes. The King, therefore, began to select a few members of the Council with whom to consult on affairs of State.

The
King's
Council

Meanwhile, as we have seen, a strenuous attempt had been made by the leaders of the progressive party under the early Stuarts to enforce the legal and political responsibility of the King's Ministers to Parliament. Notably was this seen in the case of George Villiers, Duke of Buckingham, when Sir John Eliot was the most conspicuous of his accusers, still more notably in the case of Thomas Wentworth, Earl of Strafford, pursued to his death by John Pym. Eliot had been the friend of Buckingham, Pym the friend of Wentworth, but both had fastened upon the doctrine of ministerial responsibility as the keystone of the arch of Constitutional government, and both were resolved to assert that doctrine at all costs. The revival of the practice of political impeachments went far to establish it,

Impeach-
ment

¹ For more detailed and exact discussion of these points cf. *post*.

² *Cursus Regis, Concilium Ordinarium, Concilium Secretum or Privatum*.

and it was clinched by the famous impeachment of Danby (1679) Danby was notoriously the mere agent of the King in the execution of a policy of which he personally disapproved Yet he was accused of having 'traitorously encroached to himself Regal Power by treating of matters of Peace and War with Foreign Princes and Ambassadors', of having 'traitorously endeavoured to introduce a tyrannical and arbitrary way of Government', of being 'popishly affected', of having 'wasted the King's treasure', and of having misappropriated money voted by Parliament for the disbandment of the army Preferred against the King these charges were notoriously true, preferred against Danby they were notoriously false Danby pleaded in excuse the order of the King expressed in writing, and pleaded also, in bar of an impeachment, the King's pardon granted under the Great Seal Both pleas were set aside, and thus Danby's impeachment is generally and rightly regarded as having gone far towards establishing the principle that 'no minister can shelter himself behind the throne by pleading obedience to the orders of his sovereign He is answerable for the justice, the honesty, the utility of all measures emanating from the Crown as well as for their legality' ¹

Impeachment is, however, at best a clumsy weapon Both in the case of Strafford and in that of Danby it broke in the hands of those who attempted to work it for more than it was worth It could properly apply only to offences against the law, and in neither of the crucial cases cited could the Commons secure a conviction Strafford was enmeshed, but not in the toils of an impeachment His relentless enemies, in order to catch him, were compelled to have recourse to an Act of Attainder In Danby's case proceedings were dropped Pym clearly realized the difficulty, which is stated with admirable explicitness in the *Grand Remonstrance* 'It may often fall out that the Commons may have just cause to take exception at some men for being Councillors, and yet not charge those men

¹ Hallam, II 411

with crimes for there be grounds of diffidence which lie not in proof. There are others, which though they may be proved, yet are not legally criminal.¹ The only effectual means of meeting the difficulty was, as the same document points out, for the King 'to employ such counsellors as the Parliament may have cause to confide in.' In a word, the King's Ministers must become the servants of Parliament. But the time for working out the scheme adumbrated with remarkable prescience by Pym in 1641 had not yet come. Nor was it advanced by the personal ascendancy obtained by Cromwell after the Civil War. The revival of parliamentary authority after the Restoration brought it a stage nearer, and after the Revolution of 1688 the doctrine on which it rested was not seriously disputed.

At this point it is essential to insist upon a fact which is frequently ignored and still more commonly obscured. *Ministerial* responsibility is not the same thing as *Cabinet* responsibility. In one sense the two principles are actually opposed. Parliament might well have succeeded in substantiating the principle of the legal, and perhaps even the political, responsibility of individual Ministers without ever evolving the Cabinet system. In America, for example, the President's ministers are responsible and liable to impeachment for offences committed in the discharge of their duties. Whether they are also impeachable 'for bad advice given to the head of the State' is a question which, as Lord Bryce points out, has never arisen. But, according to the same authority, 'upon the general theory of the Constitution' it would rather seem that they are not.² In England the Ministers of State are, as will be shown, both legally responsible for their individual acts, and politically responsible for their collective advice. But the two responsibilities are separable and distinct.

Towards the theory of ministerial responsibility the seventeenth century made a large and important contribu-

¹ *Grand Remonstrance*, §§ 198, 199.

² *American Commonwealth*, 1, 86.

tion, towards the doctrine of collective Cabinet responsibility it made, in outward form and seeming, none.

Nevertheless, as we have seen, the evolution of the Cabinet system was, throughout the whole of the century between 1640 and 1740, steadily progressing, and when in 1742 Sir Robert Walpole, having been defeated on the question of the Chippenham election, resigned office, it was in outline complete. That process has been already described.

It still, however, remains to examine the essential features of this peculiar and entirely original political device, and to analyse the presuppositions upon which its successful working depends. No part of our governmental machinery is at once more subtle and more characteristic of the eccentric genius of English Institutions, nor has it ever been more accurately or more picturesquely described than by one who himself contributed not a little to the success of one of the most delicate experiments ever attempted in a political laboratory.

'The Cabinet', wrote Mr Gladstone, 'is the threefold hinge that connects together for action the British Constitution of King or Queen, Lords and Commons. Like a stout buffer-spring, it receives all shocks, and within it their opposing elements neutralize one another. It is perhaps the most curious formation in the political world of modern times, not for its dignity, but for its subtlety, its elasticity, and its many-sided diversity of power. It lives and acts simply by understanding, without a single line of written law or constitution to determine its relations to the Monarch, or to the Parliament, or to the nation, or the relations of its members to one another, or to their head.'¹

The
Essentials of
Cabinet
Government

The Cabinet system as hitherto worked in England has involved the acceptance of five principles: close correspondence between the Legislature and the Executive, the political homogeneity of the Executive, the collective responsibility of the members of the Cabinet, the exclusion of the Sovereign from its meetings, and the common

¹ *Gleanings from Past Years*, 1, pp. 224-229.

subordination of its members to the leadership of a 'First Minister'

Of these principles none is more vital than the close correspondence between the Cabinet and the parliamentary majority for the time being. Such correspondence could not be established, still less could it be regularly maintained, until the definition of the Party system in Parliament. Upon the recognition of that system Sunderland's suggestion of a Ministry composed entirely of Whigs—the Whig Junto of 1697—was based. It was in deference to the same principle, then rapidly gaining ground, that Queen Anne was compelled, much against her inclinations, to admit to her Councils Whig Ministers. Not until the Country returned a Tory majority to the House of Commons in 1710 did the Queen venture to dismiss the Whigs and replace them in office by the Tories. Walpole remained in office so long as he retained the confidence of the House of Commons, but no longer. When he was defeated in 1742 on the question of the Chippenham election he resigned office, and this cardinal principle may be said to have been definitely established. Even George III so far recognized its validity as to lend all his energies to securing a subservient House of Commons, in order that he might retain a Ministry after his own heart.

Dependence on the Legislature

The principle is now maintained in two ways: first, as we have seen, by requiring that the Cabinet shall reflect the political colour of the majority in Parliament, and, secondly, by the rule that all members of the Cabinet shall be members of the Legislature. There is, indeed, no statute or legal usage to this effect, and, as we have already noted, the Legislature was, in the initial stages of Cabinet Government, exceedingly jealous of the intrusion of the Ministers of the Crown, in Parliament. The tradition of this jealousy so far survives that even now the law does not allow more than five Secretaries of State and five Under-Secretaries of State to sit in the House of Commons.¹ Yet

¹ The number was only raised to five by the Air Force Constitution Act, 1917 (7 and 8 George V, c. 51). The limit on the number of Parlia-

the Convention is one which, in Mr Gladstone's words, lies near the seat of life and is closely connected with 'the equipoise and unity of the social forces' The rule, however, is not absolute In 1880 Sir William Harcourt, when Secretary of State for the Home Department, found himself temporarily without a seat in Parliament The same fate befell Mr Goschen when appointed Chancellor of the Exchequer in 1887 And there have been other and more recent instances of the temporary exclusion of Cabinet Ministers from Parliament More striking because more deliberate was the refusal of Mr Gladstone to seek re-election at Newark when appointed by Sir Robert Peel to the Colonial Secretaryship in December 1845 As a result he was, though a leading member of the Cabinet, out of Parliament during the difficult and momentous Session of 1846 But these are exceptions which prove a rule, now firmly established ¹

Cabinet
Govern-
ment in
the Do-
minions

It is noticeable that under the written Constitutions of some of the self-governing Colonies this rule, implicit in the Constitution of the Motherland, is explicitly laid down Under the Natal Constitution of 1893, Ministers had to become Members of Parliament within four months Section 64 of the Australian Commonwealth Act of 1900 provides that 'After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a Senator or a member of the House of Representatives' The South Africa Act of 1909 ² reproduces the provision contained in the Commonwealth Act In striking contrast to the law and practice of the young Communities which inherit British traditions is the provision (Section 6) of the Constitution of the monetary Under-Secretaries of State was temporarily suspended during the war and for six months afterwards by the New Ministries and Secretaries Act, 1916 (6 and 7 George V, c 68) By an Act of 1926 (16 and 17 George V, c 18) the number of Principal and Under-Secretaries of State capable of sitting and voting in the House of Commons has been raised to six in consequence of the elevation of the Secretary for Scotland to the status of a Secretary of State

¹ I do not refer to, though I do not ignore, many exceptions which occurred between December 1916 and October 1919, when the Cabinet system was virtually in abeyance

² 9 Edw 7, c 9 III 14

United States 'No person holding any office under the United States shall be a member of either House during his continuance in office' Here as elsewhere the United States has preferred the theory of Montesquieu to the practice of England

Closely connected with the principle that the Executive shall reflect the Parliamentary majority is a second principle that of political homogeneity. It is obvious, indeed, that if the members of the Cabinet are to reflect the political colour of the parliamentary majority, they must themselves be drawn from a party itself homogeneous. Parties were, however, less clearly defined, party discipline was less strict, party allegiance less absolute in the eighteenth than in the nineteenth century. The homogeneity of the Cabinet only followed, therefore, the comparatively slow process of the evolution and consolidation of parties. The earlier Ministries of Queen Anne were essentially composite, though the Whigs gained exclusive control of the Executive in 1708 and the Tories in 1710. Under the first two Georges the Whigs were firmly in the saddle, but George III was determined, for his own purposes, to break the solidarity of the Party system, and was in a large measure successful, though the indignation evoked by the 'Coalition' of Fox and North in 1783 is significant of the increasing definition of Parties.

Political
homo-
geneity

The younger Pitt, though he started political life as a Whig, moved steadily towards Toryism, and in 1794 the Duke of Portland and some of the 'Old Whigs' joined his Ministry. On his death (January 1806) Grenville and Fox united to form the Ministry of 'All the Talents', but after Fox's death in the autumn of the same year successive Ministries were all predominantly Tory in composition. An attempt was indeed made by Spencer Perceval in 1812 to strengthen his Ministry by the inclusion of Lord Grenville and Lord Grey, but it failed, and until the formation of Lord Grey's 'Reform' Ministry in 1830 the Tory supremacy was unbroken.

The political homogeneity of Ministries was, however,

Collective
Responsi-
bility

a principle of slow growth. It is, indeed, often difficult to determine the political adhesion of the names which figure in successive Ministries during the eighteenth century. After 1784, and even more markedly after 1830, the lines of party allegiance were more strictly defined. So long as Ministries were heterogeneous in composition, a third principle, now regarded as essential to the Cabinet system, must necessarily have remained embryonic—that of collective responsibility. For many years the responsibility of members of the Cabinet was individual and departmental. The idea that Cabinet Ministers must all vote together and support the measures of the Government was not accepted until long after the time of Walpole. During the first ten years of George III's reign there were, as Sir William Haecourt pointed out, repeated examples of members of the Government opposing the measures of the administration both by speech and vote—notably Camden and Thurlow.¹ So late as 1806 Lord Temple maintained similar views. 'The Cabinet was not responsible as a Cabinet, but the Ministers were responsible as the officers of the Crown.'² Walpole had strongly favoured the opposite view, and did his best to enforce it upon his colleagues. He dismissed various colleagues who opposed his Excise Bill, but even he found it necessary to repudiate the suspicion that they were dismissed on that account. 'Certain persons', he declared, 'had been removed because his Majesty did not think best to continue them longer in Service. His Majesty has a right so to do, and I know of no one who has a right to ask him, What doest thou?' On another occasion the King sent for the Duke of Newcastle and reproached him for opposition to the policy of the Cabinet to which he belonged. 'As to business in Parliament,' he said, 'I do not value the opposition, if all my servants act together and are united, but if they thwart

¹ A. G. Gardiner, *Life of Sir William Haecourt*, II 610.

² Quoted by Anson (*op. cit.*, p. 110), who shows that the responsibility here referred to was *legal* responsibility sanctioned by the process of impeachment—not moral responsibility sanctioned by public opinion.

one another, and create difficulties to the transaction of public business then indeed it will be a different case'.¹ But thwart each other they not infrequently did. The doctrine of departmental responsibility died hard, that of Cabinet responsibility evolved slowly. At what precise point in our history it can be said to have been definitely established, it is difficult to say. Professor Hearn—an authority entitled to high respect—is inclined to regard the second Rockingham Ministry—that of 1782—as 'the first of modern ministries', from the point of view of collective responsibility and corporate unity. For the first time the new ministry came in as a body 'on the distinct understanding that measures were to be changed as well as men, and that the measures for which the new Ministry required the royal consent were the measures which they, while in opposition, had advocated'. So lately as 1763 the elder Pitt had been balked in a similar attempt. When negotiations were opened with him for the formation of a Ministry he demanded the removal of all the Ministers who had supported the Peace of 1763, and insisted that he and his friends must 'come in as a party'. No demand could have been more distasteful to George III, and Pitt's terms, which at the time were regarded as wholly extravagant, were unequivocally declined. Rockingham effected unprecedented changes in the personnel of the administration when he formed his first Ministry in 1765. 'I do not remember in my times', writes Lord Chesterfield, 'to have seen so much at once as an entire new Board of Treasury and two New Secretaries of State *cum multis aliis*'.² It is clear, therefore, that the principle of Cabinet solidarity was gaining ground rapidly in the eighteenth century. Whether Professor Hearn is strictly accurate in assigning to a specific date the final and complete establishment of the principle is more open to doubt. This at least must be said, that if we accept 1782 as a definite date we must continue to admit exceptions as proving a rule. Perhaps the most

¹ Blauvelt, *Cabinet Government in England*, pp. 237, 238.

² Hearn, *Government of England*, pp. 212, 213.

flagrant instance is that of Lord Loughborough who, as Lord Chancellor, advised the King to resist Pitt's views on the Catholic Question in 1801, and so virtually upset the Ministry of which he was a prominent member. But despite such exceptions, the theory of the Constitution is accurately interpreted in a classical passage by Lord Morley of Blackburn

'As a general rule,' he wrote, 'every important piece of departmental policy is taken to commit the entire Cabinet, and its members stand or fall together. The Chancellor of the Exchequer may be driven from office by a bad dispatch from the Foreign Office, and an excellent Home Secretary may suffer for the blunders of a stupid minister of war. The Cabinet is a unit—a unit as regards the Sovereign, and a unit as regards the Legislature. Its views are laid before the Sovereign and before Parliament, as if they were the views of one man. It gives its advice as a single whole, both in the royal closet, and in the hereditary or representative chamber. The first mark of the Cabinet, as that institution is now understood, is united and indivisible responsibility.'¹

The
Crown
and the
Cabinet

With this famous and authoritative passage from the pen of Lord Morley we may compare the even more authoritative utterance of his former chief. 'As the Queen', said Mr Gladstone, 'deals with the Cabinet, just so the Cabinet deals with the Queen. The Sovereign is to know no more of any differing views of different ministers than they are to know of any collateral representation of the monarchical office, they are a unity before the Sovereign, and the Sovereign is a unity before them'. And again 'While each Minister is an adviser of the Crown, the Cabinet is a unity, and none of its members can advise as an individual, without, or in opposition actual or presumed to, his colleagues.'²

That this rule is a sound one will be questioned by no one who has grasped the essential principles upon which the delicate mechanism of Cabinet government is held in equipoise. Yet it is not without exceptions. No Sovereign

¹ *Life of Walpole*, pp. 155, 156

² *Gleanings*, i. 74, 242

was ever more scrupulous in regard to Constitutional procedure than Queen Victoria, but in 1859 the Queen took the unusual step of writing to Lord Granville, then President of the Council, to ask whether her letter to Lord John Russell, then Foreign Secretary, in regard to his proposal to lend 'the moral support of England to the Emperor Napoleon at Verona' had been read to the Cabinet? Lord Granville's answer to this query was a model of tact. Protesting that Lord Palmerston and Lord John Russell might well resent his interference in a matter which concerned primarily the Prime Minister and the Foreign Secretary, he yet gave the Queen all the information she wanted. He made it clear that Lord John 'from a loose way of doing business' frequently overrode the decisions of the Cabinet, and that the Cabinet itself was, on the Italian question, divided; but having done all that the Queen desired he concluded his letter with a broad hint: 'It is very desirable as regards Lords Palmerston and John Russell that the Queen should show as much kindness as possible to the latter, and appear to communicate frankly with the former.' Rarely have the graces of the diplomatist and the courtier been more happily combined than in the man whom the Queen would, if she could, have made Prime Minister in 1859.

Queen
Victoria
and her
Ministers

Another incident, similar to the one recorded above, occurred in 1864. The Queen, who had by now lost her invaluable adviser, the Prince Consort, was very anxious to prevent the intervention of England, on behalf of Denmark, in the intricate question of the Danish Duchies. The Queen definitely appealed to the Cabinet, through Lord Granville, 'to be firm and support her'. She acknowledged Russell's fairness: 'but Lord Palmerston alarms and overrules him.' Lord Granville, in his communications with the Queen, was scrupulously careful to avoid even the appearance of trenching upon the rights of the Prime Minister or the Foreign Secretary; but the Queen got her way and the paragraph to which she objected was expunged from the Queen's speech.

Once again, in 1885, the Queen found herself at issue with the Prime Minister. This time the offender was Mr Gladstone, and the Queen appealed to Lord Granville, who was Foreign Secretary and leader of the House of Lords. Lord Granville replied to the Queen's remonstrance, tactfully as ever: 'Your Majesty, will readily understand what an extremely delicate matter it is for Lord Granville to enter into any question as to the relations between your Majesty and Mr Gladstone. Your Majesty may rely on perfect frankness from Lord Granville in any matter which concerns himself.'¹

Sir William Harcourt on Cabinet solidarity

Sir William Harcourt on Cabinet solidarity

Su William Harcourt in a considered memorandum on the Cabinet system explicitly confirmed Queen Victoria's theory and practice in this matter. In criticism of Lord Morley's classical chapter, Harcourt insisted on the right of the Sovereign to demand the opinion of the Cabinet as a Court of Appeal against the Prime Minister or any other Minister in his general or departmental action. As a general rule the foreign dispatches are settled between the Prime Minister and the Foreign Secretary, and are submitted to the Queen, but if she dissents she has the practical right to demand the opinion of the Cabinet on the dispatch. 'This', he adds, 'is really a very practical power in the hands of the Crown, especially where there is a strong Cabinet.'²

The Rosebery Cabinet

It is evident, however, that in this matter of Cabinet solidarity, as in many others connected with the practical working of Cabinet Government, much depends upon personalities. The rule of solidarity is apt to be most rigidly observed under a Prime Minister of dominating personality like Peel or Gladstone. Sir William Harcourt was, indeed, the colleague of Gladstone, but he was also

¹ Fitzmaurice, *Life of Lord Granville*, 1 349, 456-9. Sir William Harcourt has confirmed these facts in general terms: 'We had several instances in the 1880 Government where the Queen especially required that the Cabinet should be consulted as distinguished from the Prime Minister and the Foreign Secretary upon views stated by herself' *Op cit* II 611.

² Gardiner, *Life of Sir William Harcourt*, vol. II, Appendix II, written in 1889.

leader of the House of Commons during the Premiership of Lord Rosebery. The words quoted above were, however, written in 1889, before the differences between Harcourt and his leader had arisen. Those differences have now been revealed to the world in the authoritative biography of Sir William Harcourt. They were accentuated not only by the personal antipathy of the two men, but by the fact that while the Prime Minister and the Foreign Secretary were both in the House of Lords, the Foreign Office was represented in the House of Commons by an Under-Secretary (Sir Edward Grey) who was more in sympathy with his chiefs in the House of Lords than with his leader in the House of Commons. It was not, therefore, unnatural that Harcourt should have insisted that he was entitled to see all answers on important questions of Foreign Policy before they were given in the House of Commons, and that he should make, on behalf of the Cabinet, all important statements in debate on foreign affairs. It is plain that in this manner alone Cabinet solidarity could, under the circumstances, be maintained.¹

That the circumstances were peculiar is unquestionable, but it is also open to question whether they were quite so exceptional as to leave the convention of solidarity unaffected. This much may with safety be said: that there have been few administrations in the course of which critics were unable to point to a breach of the rule. None the less the Convention is a salutary one, and is well worth preserving, even if breaches of it should continue to be not infrequent.

A fourth principle of Cabinet Government is the irresponsibility of the Sovereign and his exclusion from the deliberations of the Cabinet.

Exclusion of the Sovereign

Long before the King's irresponsibility was politically established it had become a maxim of the Constitution that 'the King can do no wrong'. The execution of Charles I and the 'abdication' of James II proved other-

¹ *Op cit* ii 337

² See Resolution of the House of Commons, 28 January 1689

wise, and so long as executive authority was vested in the Crown, irresponsibility could be nothing but a Constitutional figment. So long as the Sovereign presided over meetings of the Cabinet some share of responsibility for decisions taken thereat must necessarily have attached to his person. The last English Sovereign who regularly followed this practice was, as we have seen, Queen Anne.

George I is said to have attended two Cabinet meetings once when evidence was laid before the Cabinet implicating Sir William Wyndham in a Jacobite plot, and, secondly, after the landing of the Pretender in Scotland in 1715, in reference to which Townshend writes to Stanhope 'the Lords of the Council, his Majesty being present, did'.¹ Sir William Anson² points out that of three instances of occasions on which the King was present since 1714, recorded by Alpheus Todd,³ two were formal meetings to lay before the King the draft of his speech to be made at the opening of Parliament, the third (shortly after the accession of George III) rests on very doubtful authority. Todd himself states that from the accession of George I, whose knowledge of the English language was limited, it became customary for Ministers to hold Cabinet meetings by themselves, and that, by the end of George II's reign, it had become 'unusual' for the Sovereign to be present at consultations of the Cabinet, and that from the time of George III the absence of the Sovereign 'may be considered as having been permanently engrafted on our Constitution'. Todd's statement errs on the side of caution. It may be taken as an established convention of the Constitution that the King shall take no part in the deliberations of the Cabinet though he does attend the Privy Council for the transaction of formal business. Such instances as can be quoted to the contrary are, so far as they relate to the period since 1714, few and quite unimportant. Thereafter the King ceased, but without loss of

¹ Blauvelt, *Cabinet Government in England*, c vi, appendix a, Cox, *Walpole*, 1 71

² *Law and Custom of the Constitution* (vol II, *The Crown*) Part I, p 40

³ *Government of England*, II 115

personal dignity, to rule, he continued, with great advantage to his people, to reign

As the King gradually surrendered the actual task of government, there appeared on the political arena a new functionary of State to whom was eventually assigned, though not until after the lapse of nearly two centuries, the official designation of Prime Minister

Subordination to a common head

Until the emergence of a First Minister the Cabinet structure could not be completed, for the Premier is, in Lord Morley's words, 'the keystone of the Cabinet arch'. The phrase is as precise as it is picturesque. The keystone holds the arch together, yet the arch maintains the keystone in position. The subordination of the members of the Cabinet to a common head may therefore be regarded as the fifth and last of the essential principles implied in the Cabinet system.

Nevertheless the position of this high functionary was for a long period, and still continues, in some measure, to be extraordinarily anomalous. From the days of Sir Robert Walpole onwards the Prime Minister has been the political ruler of England, but not until 1878 was an English Minister ever officially designated as Prime Minister,¹ and it is still doubtful whether there is technically an 'office' of Prime Minister. The point is amusingly illustrated by an incident in the life of Lord Palmerston. The latter when visiting the Clyde in 1863 was received with great enthusiasm. 'The captain of the guardship, anxious to do honour to the occasion, was hindered by the fact that a Prime Minister was not recognized in the code of naval salutes, but he found an escape from his dilemma in the discovery that Lord Palmerston was not only first Lord of the Treasury, but also Lord Warden of the Cinque Ports, for which great officer a salute

Evolution of the Prime Minister

¹ In the opening clause of the Treaty of Berlin, Lord Beaconsfield was described as 'First Lord of Her Majesty's Treasury, Prime Minister of England'. But this was, no doubt, a concession, as Sir Sidney Low (*op. cit.*, p. 154) suggests, 'to the ignorance of foreigners, who might not have understood the real position of the British plenipotentiary, if he had been merely given his official title'.

of nineteen guns was prescribed—an apt instance', as Mr. Ashley adds, 'of the minor anomalies of the Constitution under which we live.'¹

An incident which took place in the House of Commons so lately as 3 May 1906 is in this connexion not without significance. Mr. Paul, member for Northampton, had given notice of a question to be addressed to the First Lord of the Treasury. On his rising to put the question the following instructive dialogue took place :

MR. PAUL. 'Before putting this question, Mr. Speaker, may I ask for your ruling? Whenever I put down a question addressed to the Prime Minister that name is struck out at the table and the words "First Lord of the Treasury" substituted. I understood that the King had been pleased to confer the style and title of Prime Minister, with appropriate precedence, on the head of his Government, and that that was now the proper official designation of the right hon. gentleman. I have observed that you yourself, sir, have made use of it. Perhaps you will be good enough to say for the information of the House and the table whether I rightly apprehend the significance of his Majesty's most gracious act?'

THE SPEAKER. 'If I am asked to decide on the spur of the moment I should say that Prime Minister was the proper designation.'

MR. PAUL. 'I beg most respectfully to thank you for your reply and to ask the Prime Minister the question of which I have given notice.'

SIR H. CAMPBELL-BANNERMAN. 'I hope my hon. friend will find that the rose by either name will give the same answer.'

Two years before (1904), Mr. Balfour was asked in the House of Commons 'whether he was aware of any such official recognized by law as the Prime Minister?' He had already answered the question by anticipation in a speech at Haddington:² 'The Prime Minister has no salary as Prime Minister. He has no statutory duties as Prime Minister, his name occurs in no Acts of Parliament, and though holding the most important place in the Constitu-

¹ Ashley, *Life of Lord Palmerston*, II. 233.

² Quoted by Sidney Low, *Governance of England*, p. 153.

tional hierarchy, he has no place which is recognized by the laws of his country. That is a strange paradox. Some part of the paradox has been removed by the assignment to the Prime Minister of a precedence between the Archbishop of York and the premier Duke, and the title now frequently appears in official documents.¹ This settled the social position of the Prime Minister, is it certain that even now he holds an 'office' under the Crown? This at any rate may be said without fear of contradiction. It is still so far true that there is no 'office' of Prime Minister, that no one could, by usage, be Prime Minister, or sit as such in his own Cabinet, unless he held simultaneously some recognized office. This office is commonly that of First Lord of the Treasury. To this Mr Gladstone, following the precedent of Pitt and Canning, added on two occasions that of Chancellor of the Exchequer. Lord Salisbury, when Prime Minister, was for several years also Secretary of State for Foreign Affairs, and later was Lord Privy Seal.² Lord Rosebery took the office of Lord President of the Council. The precise office assumed by the Prime Minister, in addition to his own, matters not, but without such an office he would receive no salary. 'Nowhere in the wide world', says Mr Gladstone, 'does so great a substance cast so small a shadow; nowhere is there a man who has so much power, with so little to show for it in the way of formal title or prerogative.'³

Where are we to look for the protoplasm of this vigorous germ? At most periods of English history there has been a person who had many of the attributes of a Prime Minister of the Crown. Ralph Flambard under William II, William Longchamp under Richard I, Hubert Walter under King John, William of Wykeham who resigned in consequence of an adverse vote in Parliament in 1371,

Embryo-
onic
Prime
Minister

¹ Thus in the *London Gazette* at the Council Chamber, Whitehall, the 10th day of May, 1910. By the Lords of his Majesty's Most Honourable Privy Council. Present Archbishop of Canterbury, Archbishop of York, Prime Minister, Lord Privy Seal, Mr Secretary Churchill. It is this day ordered, &c.

² Mr Ramsay MacDonald when Prime Minister (1924) also held the Seals of the Foreign Office.

³ *Gleanings*, i. 244.

Wolsey and Thomas Cromwell under Henry VIII, William Cecil, Lord Burleigh, under his imperious daughter, Edward Hyde, Lord Clarendon, in the years immediately succeeding the Restoration—all these had some of the attributes of a modern Prime Minister, but they lacked, still more noticeably, the essential characteristics. They had no necessary or continuous connexion with Parliament, and they had none with a Cabinet or Council of Ministers. They were servants of the King, holding office solely at his pleasure, and responsible to him. Clarendon, it is true, was impeached by the Commons, but his fall was due primarily to the fact that he had lost the favour of the Crown, and we must recall the warning already given against the confusion between the legal responsibility of an individual Minister, and the moral responsibility of a collective Cabinet. Nevertheless, Clarendon's career marks the beginning of the period of transition. Danby was even more like a modern Prime Minister, but he was not the head of the Cabinet. In Somers we find a still closer resemblance, but William III was still in every sense of the word master in his own Cabinet. So long as that lasted there could be no Premier in the modern sense. Queen Anne strove gallantly to maintain the position of the Crown, but Godolphin's ascendancy brings us a step nearer the modern system—still, no man as yet had been Prime Minister of England.

Sir
Robert
Walpole

Sir Robert Walpole clearly was Prime Minister, and with him the earlier stages in the evolution of the official may be said to be complete. Walpole is the master of the Cabinet, his colleagues are his subordinates and nominees. He is also leader of the House of Commons, and when the House withdraws its confidence he ceases to be Prime Minister. At last we are obviously in a modern atmosphere. But there is much characteristic jealousy of the new departure. Clarendon undoubtedly interpreted aright the prevalent sentiment when in 1661 he refused the suggestion of the Duke of Ormond that he should resign the Chancellorship and be content to advise the King on questions of general

policy 'He could not consent', he replied, 'to enjoy a pension out of the Exchequer under no other title or pretence but being First Minister, a title so newly translated out of French into English that it was not enough understood to be liked, and every one would detest it for the burden it was attended with' Roger North says that Jefferies was at one time 'commonly reputed a favourite and next door to premier minister'¹ Swift frequently describes Harley as Prime Minister, and in the preface to the *Last Four Years of Queen Anne* refers to 'those who are now commonly called Prime Ministers among us' But the new title, perhaps by reason of its Gallic origin, made slow way towards general acceptance in England It was one of the most serious accusations against Walpole that he made himself 'sole minister' and 'Prime Vizier' A Protest of dissentient Peers, outvoted on the motion to remove Walpole, declared in 1741 that 'a sole or even a first minister is an officer unknown to the law of Britain, inconsistent with the constitution of this country, and destructive of liberty in any Government whatever' Sandys declared in the House of Commons 'We can have no sole and Prime Minister We ought always to have several Prime Ministers and officers of State' But more remarkable than the accusation is the defence So far from justifying the usage Walpole repudiated the title and the office 'I unequivocally deny that I am sole and Prime Minister and that to my influence and direction all the affairs of Government must be attributed I do not pretend to be a great master of foreign affairs In that post it is not my business to meddle, and as one of His Majesty's Council I have but one voice' From a real Prime Minister such a declaration would be amazing, it affirms not the modern English doctrine, not the idea of Cabinet responsibility, but that of American departmentalism

The truth is, of course, that the office was not as yet clearly defined, nor is it always quite easy to decide who, in a given administration, was actually Prime Minister

The
Pelhams

¹ *Lives of the Norths*, p. 354, ap. Blauvelt

After Walpole's resignation in 1742, Lord Wilmington (Sir Spencer Compton) is said to have become 'nominal' Prime Minister, but how far Carteret, who was a Secretary of State, or Pulteney, who was in the Cabinet without office, in practice acknowledged his primacy is doubtful. On Wilmington's death (1743) Henry Pelham became indisputably Prime Minister and himself assumed the offices of First Lord of the Treasury and Chancellor of the Exchequer. The Duke of Newcastle succeeded his brother as Premier in 1754, but resigned after the outbreak of the Seven Years War (1756), being succeeded in the nominal Premiership by the Duke of Devonshire, while the real leadership fell to Pitt as Secretary of State and leader of the House of Commons. But the Newcastle influence was still unbroken, and in 1757 Pitt had 'to borrow Newcastle's majority to carry on the Government', conceding to him the First Lordship of the Treasury and the titular Premiership.

Lord
Chatham

Was Pitt himself ever Prime Minister? The matter is not free from ambiguity, though the balance of authority inclines to an affirmative answer. If so, it can only have been during the short period from July 1766 to February 1767. On the dismissal of the Rockingham Ministry (July 1766) Pitt accepted a Peerage as Earl of Chatham and became Lord Privy Seal. The Duke of Grafton became First Lord of the Treasury. Was he also nominally Prime Minister? Thus far the Premiership, so far as it can be recognized at all, had invariably been associated with the office of First Lord of the Treasury. Since 1766 the conjunction has occasionally been severed, and no conclusive argument can, therefore, be founded on the fact that Chatham, who was already in failing health, preferred another office. Moreover, it is clear that the Ministry was formed by Chatham, and that the offices, including that assigned to Grafton himself, were allocated by him.¹ No

¹ Cf. *Autobiography of Augustus Henry, 1st Duke of Grafton* (ed. Anson). Grafton says (p. 90) Mr. Pitt 'added that His Majesty had given him full power thus to form a Ministry'. Cf. also *Chatham Correspondence*, III, pp. 22-33, *Granville Correspondence*, III, 308.

subordinate Minister would have declined, as Chatham did in February 1767, to acquaint his colleagues with his views on an important question of policy. Nor would Grafton, if Prime Minister, have acquiesced in the refusal.¹ By February, however, Grafton was evidently 'acting' Prime Minister, and when Chatham retired into private life, Grafton became the real as well as the effective head of the Ministry.²

Lord North, who in 1770 succeeded the Duke of Grafton, combined the Chancellorship of the Exchequer with the First Lordship of the Treasury, but during North's long tenure of the nominal premiership, King George III realized his mother's ambition and was 'really King'.

Lord
North
and
George
III

On North's resignation (1782) Lord Rockingham formed a Ministry, which by reason of its political homogeneity is, as we have seen, commonly regarded as marking a distinct stage in the evolution of the Cabinet. Shelburne succeeded to the premiership on Rockingham's death, after a few months of office, and like all his predecessors except Lord Chatham assumed the office of First Lord of the Treasury. So did the Duke of Portland, who was nominal Prime Minister during the Ministry commonly known as the 'Coalition of Fox and North', who were the Secretaries of State.

No ambiguity attaches to the position of the younger Pitt, who definitely claimed both the place and title repudiated by Walpole. In conversation with Melville in 1803 he dwelt 'pointedly and decidedly upon the absolute necessity there is in this country that there should be an avowed and real minister, possessing the chief weight in the Council and the principal place in the confidence of the King. In that respect (he contended) there can be no rivalry or division of power. That power must rest in the person generally called the First Minister.'

The
Younger
Pitt

The office, perhaps, reached its zenith in the person of Sir Robert Peel. He was, says Lord Rosebery,

Peel

'the model of all Prime Ministers. It is more than doubtful, indeed, if it be possible in this generation, when the burdens of

¹ *Grafton Autobiography*, p. 116

² *Op cit*, c. 8 p. 118

Empire and of office have so incalculably grown, for any Prime Minister to discharge the duties of his high post with the same thoroughness or in the same spirit as Peel. Peel kept a strict supervision over every department—he seems to have been master of the business of each and all of them—it is probable that no Prime Minister ever fulfilled so completely and thoroughly the functions of his office, parliamentary, administrative, and general as Sir Robert Peel.¹

Mr Gladstone's testimony is to the same effect: 'Nothing of great importance is matured or would even be projected in any department without his personal cognizance.' But Peel himself was clearly becoming conscious that his own conception of his great office was 'becoming impossible of realization, except by sending all Prime Ministers to the House of Lords'²—a solution to which he personally refused to assent. Mr Gladstone declared that 'the Head of the British Government is not a Grand Vizier'. Lord Rosebery hints that Mr Gladstone, in his first Ministry of 1868, may have occupied a position equal to Peel's, but he declares with emphasis—and not without knowledge—that the position of a modern Prime Minister is very different. He is merely 'the influential foreman of an executive jury', he has 'only the influence with the Cabinet which is given him by his personal arguments, his personal qualities, and his personal weight'.³ Lord Rosebery writes, of course, with great authority, but it would not be wise to lay too much stress upon a constitutional *dictum* obviously coloured by recent personal experience obtained under circumstances which were perhaps exceptional.

Position
of the
Prime
Minister

Whatever be the position of a Prime Minister in relation to his Cabinet colleagues, there is no ambiguity in his relation to the general machinery of the State. Backed by a stable and substantial majority in Parliament, his power,

¹ Rosebery, *Sir Robert Peel*, pp. 27-9.

² 'I defy the Minister of this country to perform properly the duties of his office—and also sit in the House of Commons eight hours a day for 118 days.' Peel, *Papers* (ed. Parker), III, 219.

³ Rosebery, *Pref.*, pp. 32, 33. The whole passage is one of extraordinary interest, but the warning in the text should not be neglected.

as Sir Sidney Low truly has observed, is greater than that of the German Emperor or the American President, 'for he can alter the laws, he can impose taxation and repeal it, and he can direct all the forces of the State. The one condition is that he must keep his majority, the outward and concrete expression of the fact that the nation is not willing to revoke the plenary commission with which it has clothed him' ¹ The Prime Minister occupies in fact a four-fold position: he is (to put it at the lowest) the chairman of the Executive Council, he is the leader of the Legislature, he is indirectly the nominee of the political sovereign or electorate, and finally he is, in a special degree, the confidential adviser of the Crown and the ordinary channel of communication between the Crown and the Cabinet.

'He reports to the Sovereign', says Mr Gladstone, 'its proceedings, and he also has many audiences of the august occupant of the Throne. He is bound, in these reports and audiences, not to counterwork the Cabinet, not to divide it, not to undermine the position of any of his colleagues in the Royal favour. If he departs in any degree from strict adherence to these rules, and uses his great opportunities to increase his own influence, or pursue aims not shared by his colleagues, then unless he is prepared to advise their dismissal he not only departs from rule, but commits an act of treachery and baseness. As the Cabinet stands between the Sovereign and the Parliament, and is bound to be loyal to both, so he stands between his colleagues and the Sovereign and is bound to be loyal to both' ²

Such is the position of an English Prime Minister, and such the structure to which he supplies the cement. From 1714 to 1914 the Cabinet system developed steadily, and, save for George III's attempt to revive personal monarchy, without interruption. The Great War proved that there were grave limitations to its utility as a war-machine. Were the defects revealed by war-conditions inherent in the mechanism? Was the mainspring of the Constitution

¹ *Op cit*, p. 47

² *Gleanings*, I. 243

showing signs of obsolescence even before the exceptional strain put upon it by the war?

Is the
Cabinet
system
obso-
lescent?

Since 1911 the English Constitution had admittedly been in a condition of suspense 'There is no party in England at this moment which regards our present Constitutional arrangements as anything but temporary and provisional. We are plodding along under an ever-accumulating load of unfulfilled promises and unrealized Preambles. The Constitutional fabric is confessedly incomplete to the artist a mere *torso*, to the grammarian a protasis without an apodasis' ¹ These words were written in December 1913. They were inspired by contemporary conditions by the unfulfilled promise contained in the Preamble to the Parliament Act of 1911, and by the large expectations held out in connexion with the Home Rule Bill of 1912, which was avowedly proposed as an instalment of Federalism for the United Kingdom. Nothing could have been, from that standpoint, less adroitly drafted, no indication was given of the lines on which the rest of the building was to be reconstructed. But the relevant point is that the structure of 1913 confessedly lacked a coping-stone, the Constitution, to vary the metaphor, had been cast into the cauldron, and had not emerged.

Machin-
ery of
Govern-
ment
Commit-
tee, 1917

If the whole machinery of the State was beginning to creak ominously, the creaking was more clearly perceptible in that section which kept the Executive in operation. A Committee appointed in July 1917, under the chairmanship of Viscount Haldane of Cloan, reported that 'a rearrangement of the supreme direction of the Executive organization as it formerly existed has been rendered necessary, not merely by the war itself but by the prospect after the war' ²

Lord
Lans-
downe on
the
Cabinet

Experienced administrators had arrived at similar conclusions. Thus Lord Lansdowne, speaking in the House of

¹ They appeared in an article by the present writer in *The Nineteenth Century and After* for January 1914. They are quoted here with all due apologies merely as evidence of contemporary pre-war opinion.

Report of Committee on the machinery of Government (Cd. 9230, 1918, p. 5)

Lords, 19 June 1918, of the old Cabinet system, attributed the breakdown of the system to the increase in the number of Cabinet Ministers

'I think', he said, 'the trouble really arose from the rapid increase in the number of the members of the Cabinet. It became an unwieldy body. If only a few of them took part, the Cabinet ceased to be representative. If many of them took part, the proceedings tended to become prolix and interminable, and it is a matter of common knowledge that reasons of that kind led to the practice of transacting a good deal of the more important work of the Government through the agency of an informal inner Cabinet.'¹

The development of an 'inner Cabinet' was indeed as notorious as it was inevitable. The old system was breaking down under the sheer weight of numbers. Pitt's Cabinet, responsible for the conduct of the French War, 1793-1801, contained ten members, his second twelve, Grenville's 'All the Talents' Ministry fourteen, Spencer Perceval's only ten. During the nineteenth century Cabinets ranged as a rule from fourteen to seventeen members, though Disraeli's second administration (1874-80) consisted of only thirteen. Lord Salisbury included sixteen members in his Cabinet of 1886 and nineteen in that of 1895, while the last pre-war Cabinet contained no fewer than twenty-one members.²

Increase of numbers would seem to have involved a decrease of collective efficiency. Methods of transacting business appropriate to a Cabinet of twelve or fourteen persons could not yield satisfactory results when the Cabinet numbered over a score, and when, moreover, many of that number represented departments whose administrative responsibilities were extending with appalling rapidity. No board of directors, working in the old informal way, could keep abreast of the work. Lord Curzon of Kedleston, speaking, like Lord Lansdowne, with

Lord
Curzon's
views

¹ House of Lords Official Report, 20 June 1918.

² Reduced to twenty by Colonel Seely's resignation and Mr. Asquith's assumption of the War Secretaryship.

experience of more than one type of Executive Government, cast a lurid light upon the confusion of Cabinet procedure ' I do not think ', he said, ' anybody will deny that the old Cabinet system had inevitably broken down both as a war machine and as a peace machine '

The meetings of the Cabinet were most irregular, there was no order of business, no agenda, no record of decisions arrived at

' The Cabinet often had the very haziest notion as to what its decisions were, and I appeal not only to my own experience but to the experience of every Cabinet Minister who sits in this House, and to the records contained in the Memos of half a dozen Prime Ministers in the past, that cases frequently arose when the matter was left so much in doubt that a Minister went away and acted upon what he thought was a decision which subsequently turned out to be no decision at all, or was repudiated by his colleagues Ministers found the utmost difficulty in securing decisions because the Cabinet was always congested with business '

Critical of the system, or lack of system, in the past, Lord Curzon ventured upon a prediction as to the future

' I think ', he said, ' you will find the Cabinets in the future will all be subject to a great reduction of numbers from the old and ever-swollen total to which reference has been made I do not think we shall ever have a Cabinet of twenty-two or twenty-three Ministers again Secondly, I think the presence of other Ministers than Cabinet Ministers at the discussions will also become an inevitable feature of future Cabinet procedure Thirdly, the preparation of an agenda in order that we may know in advance what we are going to discuss is an inevitable and essential feature of business-like procedure in any Assembly in the world Fourthly, I doubt whether it will be possible to dispense with the assistance of a Secretary in future Fifthly, I think that a record and minutes of the proceedings will have to be kept, and, lastly, I hope for a very considerable development of the system of devolution and decentralization of Government work which I have described '¹

Lord Curzon's confident forecast was based upon

¹ House of Lords Official Report, 19 June 1919

eighteen months' experience of the striking constitutional experiment initiated by Mr. Lloyd George on his accession to the Premiership in December 1916.

Mr. Lloyd George himself explained the reason for the change with blunt common sense. The War Cabinet

'The kind of craft you have for river or canal traffic is not exactly the kind of vessel to construct for the high seas. I have no doubt that the old Cabinets were better adapted to navigate the Parliamentary river with its shoals and shifting sands, and perhaps for a cruise in home waters—but a Cabinet of twenty-three was top-heavy for a gale. . . . It is true that in a multitude of counsellors there is wisdom. That was written for Oriental countries in peace times. You cannot run a war with a Sanhedrin.'¹

Accordingly a War Cabinet or Directory was appointed by the new Prime Minister to supervise the conduct of the war. It consisted of five members, the Prime Minister, Lord Curzon, Lord Milner, Mr. Bonar Law, and Mr. Arthur Henderson. Of these, one was a Liberal, three were Conservatives, and one a Socialist. One only, the Chancellor of the Exchequer (Mr. Bonar Law), was a Departmental Chief, and he also led the House of Commons, a triple burden which undoubtedly contributed to his premature death in 1922. The intention was that the rest of the Directory—ultimately increased to seven members—should be entirely free to devote themselves, uninterrupted by Departmental or Parliamentary duties, to the conduct of the war.

How far the older Cabinet was superseded by its younger rival is a question which still rests wrapped in an ambiguity characteristic of the English Constitution. Questioned on the subject in the House of Commons by the present writer, Mr. Law denied that there was in being any Cabinet other than the War Cabinet; and further denied that there were any Cabinet Ministers other than the five who, in July 1919, constituted the 'War Cabinet'.²

¹ *The Times*, 20 December 1916.

² *Official Report*, 31 July 1919, p. 2277.

Yet there were as a fact other Ministers—Heads of the principal Departments—who conceived themselves to be members of a Cabinet, if not *the* Cabinet, who received, in the usual form, a summons to meetings of 'His Majesty's Servants', who attended a weekly breakfast at No. 10 Downing Street, and, under the chairmanship of the Home Secretary, maintained a semblance of collective responsibility. Yet technically Mr. Bonar Law was correct: the only Cabinet existing between 1917 and 1919 was the 'War Cabinet'.

The War
Cabinet

The War Cabinet itself met almost daily, sometimes twice or thrice in one day—300 times in all during the year 1917—and received at every meeting reports from the Foreign Secretary, the First Sea Lord of the Admiralty, and the Chief of the Imperial General Staff.¹ The heads of Departments attended only when the affairs of their several Departments were under discussion. The administration of domestic affairs thus became virtually departmental. The clash of arms is apt not only to silence laws, but to set aside many constitutional conventions; above all it led to the rapid multiplication of ministries and therefore ministers and the line between Cabinet and non-Cabinet Ministers was not, in fact, rigidly defined. Moreover, the War Cabinet itself developed in a direction not originally contemplated. Designed as a War Directory, it developed into a species of Super-Cabinet, to which Departmental Ministers were summoned as occasion required, and at which their differences were adjusted. In addition to this, the War Cabinet was responsible for assigning an immense amount of business to individual Ministers or to *ad hoc* Committees, and for setting up Standing Committees to deal with matters of more continuous importance.

The War Cabinet system did not long survive the conclusion of Peace. The Haldane Report contemplated that the Cabinet of the future should approximate to that of the War Cabinet; that it should consist of ten or twelve members who were not, as a rule, to act as Heads of

¹ Cf. *Reports of the War Cabinet for 1917 and 1918*.

Departments, but to exercise functions supervisory and co-ordinating rather than directly administrative. The Peace was hardly signed, however, before Parliament began to manifest curiosity, if not impatience, as to the prolongation of an experiment ostensibly due only to the special circumstances of the war. Accordingly in October 1919 it was quietly announced that a Cabinet, of the pre-war type of twenty members, had been appointed. Not have subsequent Cabinets deviated, in outward appearance, from the traditional pattern.

Outward appearances are, however, rarely to be trusted where the mechanism of the English Constitution is concerned. In formal shape the pre-war Cabinet has been restored, but has the war left no traces upon this the most delicate part of the machine? As to the character and the value of the legacy bequeathed to the post-war Cabinet, there may be, and are, differences of opinion: but there can be no question that the survival of a Cabinet Secretariat does represent a constitutional innovation of considerable significance.

The
Cabinet
Secre-
tariat

That the old machinery had shown signs of obsolescence is proved on the unimpeachable testimony, already quoted, of Lord Lansdowne and Lord Curzon of Kedleston. Yet before the war the Cabinet did not as a rule meet more than once a week—if so often—during forty weeks in the year. Post-war statistics tell a very different tale. The old Cabinet system, as we have seen, was revived only in the autumn of 1919. In 1920 there were 82 Cabinet meetings, and in 1921 there were 93. 'In addition to that there are the Conferences of Ministers, in effect Cabinet Committees, the Home Affairs Committee, which is now (1922) a Standing Committee of the Cabinet, to which a large amount of business is relegated, a Finance Committee, and various sub-committees of the Cabinet.' Including all these Committees there were in 1920 no fewer than 332 meetings and 339 in 1921. The pace has now slowed down, but in the year ended 31 March 1925 there were 62 meetings of the full Cabinet and 159 meetings of

Cabinet Committees, in addition to 154 meetings of the Committee of Imperial Defence and its Sub-Committees. In face of such figures one may well ask with a Cabinet Minister of great experience, 'How are you to co-ordinate the work of these Committees?' How is the Cabinet itself to keep any control over them unless a record be taken of the work of the Committees and unless that record be available with the decisions of the Committees for the consideration of the Cabinet?'¹

Those questions explain, and in the opinion of many justify, the continuance of an important war-time experiment, the Cabinet Secretariat.

The Com-
mittee of
Imperial
Defence

In its origin the Cabinet Secretariat was a development of the Committee of Imperial Defence, an organization which was initiated to co-ordinate the work of the Army and the Navy, and to envisage and discuss as a whole the problem of defence, not merely for the United Kingdom but for the Empire. For the first ten years of its existence the Committee was a somewhat nebulous body, but in 1904, mainly through the efforts of Mr (now the Earl of) Balfour, who was then Prime Minister, it was reorganized with a small but permanent secretariat and staff.² Of this Committee the Prime Minister is chairman, and the ordinary members are the Secretaries of State for Foreign Affairs, the Colonies and Dominions, India, War, and Air, the Chancellor of the Exchequer, the First Lord of the Admiralty, the First Sea Lord, the Chief of the Imperial General Staff, the Chief of the Air Staff, and Directors of the Intelligence Departments of the War Office and the Admiralty. The Prime Minister is expressly empowered to call for the attendance of any military or naval officers, or of other persons, with administrative experience, whether they are in official positions or not. In particular the advice is sought of the representatives of the Dominions. Records of its proceedings are kept, and are available for reference by successive Committees. In the

¹ Mr Austen Chamberlain in House of Commons *Official Report* for 13 June 1922

² The estimate for the Committee for the year 1904-5 was £2,960

first months of the Great War a War Council was set up (25 November 1914), with Sir Maurice Hankey, the Secretary of the Imperial Defence Committee as its Secretary. This was replaced (June 1915) by the Dardanelles Committee, 'so called because that was the campaign which was at the moment occupying the greater part of the attentions of the Government',¹ and this Committee expanded into the War Committee until the latter was in turn superseded (December 1916) by the War Cabinet already described.

Distinct from the Cabinet Secretariat which has its offices in Whitehall Gardens, and not to be confused with it, is the personal Secretariat of the Prime Minister. In 1913 this amounted only to four persons, and the cost of it was £1,017 a year. The personal staff was necessarily augmented during the war and had to be accommodated in temporary offices in the garden of 10 Downing Street, and was consequently nicknamed the Kindergarten or the Garden Suburb. So rapidly did it grow during the war and the first years of peace that in 1922 the staff numbered twenty and cost the Exchequer £9,318 a year. Since that time it has again been reduced to reasonable proportions.

To return to the Cabinet Secretariat. Including the Committee of Imperial Defence, with which it constitutes for staff purposes a single unit, the staff numbered, in 1918, 98, and the cost of it was £19,600. By 1922 the staff had unaccountably swollen to 137, and the cost still more unaccountably to £36,800. These facts evoked strong comment in Parliament, and the staff has now (1924) been reduced to 38, costing £15,500 a year.² The Secretariat itself must, however, now be regarded as a permanent part of the constitutional machinery. Its precise character and functions are nevertheless somewhat obscure. Its critics represent it as virtually a new Department thrust in

¹ On the work of the Cabinet Secretariat during the war, cf. two informative papers by Mr. Clement Jones, one of the Assistant Secretaries of *Empire Review* for December 1923 and January 1924.

² The staff has increased (1926) to 42, and the estimated cost to £17,771.

between the Cabinet and the administrative Departments, and in particular between the Cabinet and the Foreign Office, an appropriate adjunct of a new system of 'presidential' as opposed to 'Cabinet' government. Its apologists deride these fears, maintaining that its functions are merely secretarial, that it only prepares the *agenda* for the Cabinet, keeps the minutes, records decisions, and transmits those decisions to the Departments which have to carry them out. The Prime Minister mainly responsible for the development of the Cabinet Secretariat said of it:

'They are a recording Department, they are a communicating Department, they are a means of transmitting to Departments the decisions not merely of the Cabinet, but of the very considerable number of Cabinet Committees that have always been set up in every administration, but which, of course, have been multiplied considerably since the War.'¹

Does this authoritative passage exhaust the functions of the new Secretariat? If it does, the machinery provided for functions so modest would seem to be unnecessarily costly and elaborate. A mere conduit pipe might surely have been provided at less expense. But it is almost inevitable that a mechanism so obviously convenient should rapidly develop. A medium of communication is apt to become part of the machinery of control. Has the Cabinet Secretariat escaped that tendency? Lord Robert Cecil, not without some experience of Cabinet office, expressed the fear lest the Cabinet Secretariat might lead to a diminution of departmental responsibility, more particularly in the case of the Foreign Office. In this way the control of the House of Commons was necessarily relaxed, and the power of the Prime Minister inevitably exalted. As it was put in the debate to which reference has already been made:

'The position of the Prime Minister in foreign affairs, at least, closely resembles the position of the President of the United States, much more closely than it resembles the position of the Prime Minister under the British Constitution before

¹ *Official Report*, 13 June 1922

the War. The chief engine in this revolution has undoubtedly been the Cabinet Secretariat.¹

For this development there were, however, other reasons, personal and temporary. The resignation of Mr. Asquith opened the way for a Prime Minister endowed with omnivorous energy and faced by a unique emergency. It is small wonder that, cut off by the necessities of the hour from continuous contact with the House of Commons, and Chief of a War Directory, the Prime Minister should have allowed his office to approximate to that of an American President. But that tendency was arrested, partially by the restoration of a normal Cabinet in the autumn of 1919, and completely by the dissolution of the Coalition and the return to Party Government in 1922.

Nevertheless, the experiment has left its mark on the administrative system in the institution of the permanent Cabinet Secretariat, and in those modifications of Cabinet procedure to which reference has already been made. The proverbial flexibility of the English Constitutions forbids more scientific analysis or more precise measurement of the changes wrought by recent events in the fabric of the English Polity.

¹ The Hon. Walter Guinness *op. Official Report*, 13 June 1922, p. 252.

XXVI THE PROBLEM OF THE EXECUTIVE (4)

Presidential Government

'We ought not to consider a Minister of the English type, conducting legislation and administration at once, and rising and falling at the pleasure of Parliament, to be necessarily the normal, and only proper, result of political development'—SIR JOHN SEELEY

'Under the existing regime it is from the Sovereign alone that emanates the directing idea in every transaction'—FRENCH OFFICIAL COMMUNIQUE, 22 September 1863

'The President of the Republic shall be responsible only in case of high treason'—ORGANIC LAW OF FRANCE (21 FEBRUARY 1875)

'The President presides but does not govern, he can form no decision save in agreement with his Ministers, and the responsibility is theirs. The President, therefore, exercises no power alone'—RAYMOND POINCARÉ (1913)

'With us the King himself governs'—BISMARCK (1882)

'No person holding any office under the United States shall be a member of either House during his continuance in office'—THE CONSTITUTION OF THE UNITED STATES, VI 2

'Energy in the Executive is a leading character in the definition of good government. The ingredients which constitute energy in the Executive are, first, unity, secondly, duration, thirdly, an adequate provision for its support, fourthly, competent powers. Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justice of their views have declared in favour of a Single Executive'—HAMILTON, *The Federalist*, No LXX

RESPONSIBLE Government is, in the sphere of Politics, the most characteristic achievement of the English genius for affairs. Is it also the most commendable? It would be rash to assume that the answer to this question will necessarily be affirmative, or that, even for Great Britain and the other nations of the British Commonwealth, the Cabinet system is the last word in Political Science. Sir John Seeley has pointed out that Responsible Government as evolved in England was 'much more casual and accidental, much less necessary than is commonly supposed', and that so far from being a 'necessary result of the growth

Parliamentary Executive or Presidential

of the " spirit of liberty " , it was ' a very peculiar result of very special circumstances ' .¹

In England, however, the Parliamentary type of Executive, in short the Cabinet system, has approved itself by the experience of two hundred years. Moreover, the system has been extensively imitated, though not with unqualified or universal success. It was not copied by the architects of the Constitution of the United States, where the Executive, as we have seen, is not Parliamentary but Presidential.

The
Choice of
the Exe-
cutive in
the
Modern
State

Between these two types the choice for the modern State would seem to lie. Let it be observed, however, that it by no means follows that Republics must be ' Presidential ' , still less that Monarchies must be ' Parliamentary ' . On the contrary, a Parliamentary Executive is compatible equally with a Republic and an Hereditary Monarchy, provided that in each case the Head of the State is a ' constitutional ' and not an autocratic ruler. Conversely, a ' President ' may be either crowned or uncrowned. The Monarch under the Hohenzollern Empire in Germany conformed clearly to the ' Presidential ' type. Executive authority was vested not in Ministers responsible to the Legislature, but in the Emperor. The Imperial Chancellor was as much the servant of the Emperor William I or II as was Wolsey or Thomas Cromwell the servant of Henry VIII. Wolsey had sometimes to explain the Royal policy to Parliament as Bismarck had to defend himself and his master in the Reichstag. The Emperor, however, was the real ruler of Germany ; he not only reigned but governed.

The
French
President

In modern France, on the contrary, the President is a constitutional Head of the State. His position was somewhat sardonically analysed by Sir Henry Maine in the following passage :

' . . . there is no living functionary who occupies a more pitiable position than a French President. The old Kings of France reigned and governed. The Constitutional King, according to M. Thiers, reigns, but does not govern. The

¹ *Introduction to Political Science.*

President of the United States governs, but he does not reign. It has been reserved for the President of the French Republic neither to reign nor yet to govern.'

How far does this description, written some forty years ago, still correspond to the facts? The formal position of the French President can be very briefly stated. The President is the supreme Representative of the State. He is elected by an absolute majority of the suffrages of the Senate and the Chamber of Deputies, acting in joint session as the National Assembly. The procedure at the election, which takes place at Versailles, is graphically described by M. Raymond Poincaré, himself President of the Republic during the critical years 1913-20.

'When the Assembly is convoked for a Presidential election the members vote without discussion. The urn is then placed in the tribune and as an usher with a silver chain calls their names in a sonorous voice the members of the Assembly pass in a file in order to deposit their ballot papers. The procession of voters lasts a long time, there are nearly nine hundred votes to be cast. When the voting is completed the scrutators, drawn by lot from among the members of the Assembly, count the votes in an adjoining hall. If no candidate has obtained an absolute majority of votes, the President announces a second ballot, and so on, if needful, until there is some result.'

The President is elected for seven years but is re-eligible for any number of terms. In fact, only one President, Jules Grévy, has been re-elected, and in consequence of a financial scandal, in which his son-in-law was involved, Grévy resigned early in his second term. From 1871 to 1875 the President had been responsible to the Legislature, but the inconvenience and even the danger of this principle soon became apparent, and since 1875 the President has been irresponsible save in the event of high treason. If accused of high treason the President may be impeached by the Chamber of Deputies and tried by the Senate. The Senate has the power to proclaim his dismissal and to impose the appropriate penalties. Otherwise, the Presi-

¹ *How France is Governed* (Eng. trans.), pp. 168-9.

dent is, for the duration of his legal term, unremovable, although, as was seen in the case of M. Millerand, the Chambers can render the position of the President untenable¹. For the rest the whole responsibility is assumed, as in England, by his Ministers, by one of whom all his proclamations must be countersigned.

In a social and ceremonial sense the position of the President is one of high dignity. He is lodged at the Palais d'Élysée, and the castles of Rambouillet and Fontainebleau are assigned to him as country houses. He receives a salary of 1,200,000 francs a year, and an equal amount for expenses, but the salary is subject to the annual review of the Legislature—a system which is hardly consonant with the dignity of the Head of the State, and one, moreover, which might conceivably result in undesirable bargaining.

The President is the Grand Master of the Legion of Honour, he represents the State in national solemnities, and *vis-à-vis* foreign Powers, foreign ambassadors are accredited to him and from him ambassadors receive their letters of credence. The majesty of his person is secured by a special law enacted as a protection against attacks in the press, and he has the right of immunity or 'grace'. He is constitutionally the head of the fighting forces of the Republic, and conveys to them the encouragement and gratitude of the nation.

The President and the Legislature

The President shares with both Chambers the right of initiating laws, but he has no veto on legislation. He can, however, refuse to promulgate a law, and, by means of a reasoned message, may require the Legislature to give further deliberation to the projected law. His power of retardation lasts only a month, and should the Legislature insist, the law must be promulgated in its original form.

It is the President's duty to convoke and prorogue the

¹ In June 1924 President Millerand commissioned M. François Marsal to form a stop-gap ministry, for the purpose of conveying to the Chambers a message from the President. Thereupon the National Assembly declined to receive a message from the Government and M. Millerand resigned.

Legislature, but the Chambers, if not convoked earlier, must meet at latest on the second Tuesday in January and must sit for at least five months. The President may adjourn the Chambers, but not for a period exceeding one month and, not for more than twice in one session. Extraordinary sessions may be, and are, almost annually, summoned at the discretion of the President. The President also enjoys the prerogative, with the assent of the Senate, of dissolving the Chamber of Deputies, before the expiration of its legal term. This prerogative is, as already indicated, of real constitutional importance, though the prerogative has only once been exercised.¹

The most important function assigned to the President is that of selecting a Prime Minister. Owing to the multiplication of groups in the French Chamber, the choice of a successor to an outgoing Premier is much less clearly indicated to the President than to an English Sovereign, and, consequently, the performance of this political function calls for no little tact and experience on the part of the President. He usually consults the Presidents of the Senate and the Chamber of Deputies, whose knowledge of the parliamentary situation is even more intimate than his own. As to the selection of the other Ministers, the President may proffer advice to the Premier, or President of the Council, to give him his official title, but the latter need not take it. Nevertheless, as a distinguished French publicist has said, the Head of the State is 'something more than a great elector of ministers. The constitutional irresponsibility of the President of the Republic does not prevent his bearing a heavy moral responsibility towards the nation in the nomination of his ministers.'²

The President and his Ministers

That responsibility must needs be enhanced by the regular attendance of the President of the Republic at the Councils of Ministers. A French Cabinet meets in two capacities: (i) as a *Conseil des Ministres*, (ii) as a *Conseil*

¹ By President MacMahon, who in 1877 hoped to get a Chamber in accord with his personal views. His failure has discouraged a repetition of the experiment.

² Joseph-Barthélemy, *The Government of France* (Eng. trans.), p. 91.

de Cabinet The former is something between an English Privy Council and a Cabinet Council. Its meetings are prescribed by law, and are held at the Élysée, in the presence of the President of the Republic, though the latter cannot vote. Formal business is there transacted, but not formal business only. As a rule there are two meetings a week and the main lines of State policy, especially in relation to foreign affairs, are there laid down. The *Conseil de Cabinet* meets, as a rule, once a week, under the chairmanship of the President of the Council, and is largely concerned with the details of parliamentary business, a topic which occupies perhaps a disproportionate part of the time of an English Cabinet. It cannot be easy or even possible always to keep the two topics apart, but there is evidently some advantage in such a variation of procedure as necessitates the attempt to do so. No minutes are kept at either Council.

Foreign
Affairs

In the conduct of international relations the President of the French Republic plays an important and, in certain circumstances, may play a decisive part. He not only represents the State in all formal relations, but has the right to negotiate and ratify treaties, though not to declare war without the assent of both Chambers. On his election in 1920 M. Millerand is understood to have insisted that the Constitution imposed upon the President the duty of active participation in foreign policy. How far he succeeded in upholding his contention is a secret hid in the breasts of himself and the Ministers who served him. During at least half of the time of his Presidency he found himself *vis-à-vis* a Minister of very masterful personality, whose will was not likely to have been deflected, had they clashed, by that of the President of the Republic.

In a Parliamentary Democracy, whether it be monarchical or Republican in form, much must evidently depend on the personal equation, but the foregoing sketch should make it plain that the French President is not a *meri roi sans éant*. The Constitution, as has been truly observed, meant to invest him with 'a real and dominating

authority',¹ doubtless with a view to the easier restoration of a Monarchy. MacMahon, the first President, favoured a restoration, though the effect of his autocratic methods was to weaken the presidential office. His successor, Grévy, weakened it of set purpose, and from his time onwards it was the deliberate policy of successive National Assemblies to prefer the weaker to the stronger candidate. Casimir Périer, elected after the assassination of Carnot (1893), was a notable exception to this rule, but, after a few months of office Périer resigned in despair. 'The Presidency of the Republic [so ran his resignation message of 15 January 1894] is deprived of means of action and of control. I cannot reconcile myself to the weight of moral responsibilities laid upon me and the impotence to which I am condemned'. Perhaps Périer was oversensitive, or overstrained. Be that as it may, it is certain that a President of powerful personality can and does exercise a real influence upon affairs, partly in virtue of the duration of his office, glaringly contrasted with the brevity of ministerial tenure, partly in virtue of his regular presence at *Conseils des Ministres*. The latter custom evidently enables him to exercise more continuous influence upon public affairs than an English Sovereign. He does not indeed reign: yet the second part of Sir Henry Maine's aphorism clearly demands some modification.

The German Constitution of 1919 provides for an elected President who is plainly intended by the terms of the Constitution to play the part of a 'Constitutional Ruler'. It was a matter of considerable dispute in the Constituent Assembly whether it was desirable to have a President at all, and if so what his constitutional position and powers should be. Some members of the Weimar Assembly were opposed to the creation of a President, on the ground that, however circumscribed his powers, he would tend to prepare the ground for a monarchical restoration. Others argued in favour of a President of the American type who should be a real chief of the State and independent of the

The Ger-
man Pre-
sident

¹ Joseph-Barthelémy, *op cit*, p. 81

Legislature The situation was like that of France in 1875 when the Monarchists elected Marshal MacMahon as a warming-pan for the Monarchy But the German Monarchists have had to content themselves with a strictly Constitutional President, whose powers are even more strictly circumscribed than those exercised by the Head of the State in France or England

Election
and
Powers

The President of the Reich is elected not like the French President by the Legislature but by the popular vote of the whole German people By an amendment of 1920 the President must receive on the first ballot an absolute majority of the votes cast, though on a second ballot a mere plurality suffices On the death of the first President (Ebert) in 1925, the candidate of the Right, Dr Jägers, did in fact fail to secure an absolute majority A second ballot was consequently required, at which Field-Marshal von Hindenburg (who had replaced Jägers as the candidate of the Right) received 14,655,766 votes as against 13,751,615 cast for Dr Marx, while 1,944,567 were given to other candidates The President is Commander-in-Chief of the army and navy, and represents the Reich in foreign affairs, but a declaration of war can be made only by the Legislature, while alliances and treaties require its assent If public safety is disturbed, the President may temporarily suspend the constitutional guarantees of freedom of speech, &c, but all his decrees and orders must be countersigned by a Minister, who thereby accepts responsibility for them Moreover, any suspension of constitutional guarantees must be promptly communicated to the Reichstag which may require their abrogation

The President or any of his Ministers may be impeached by a two-thirds vote of the Reichstag, the trial being held in the Staatsgerichtshof He may also be removed from office by a referendum demanded by a similar majority in the Reichstag If the popular vote is in favour of the President, he resumes office for a further term of seven years and the Reichstag is automatically dissolved The latter provision will obviously make the Reichstag cautious

in the exercise of a power which may result in extending the term of a President and abruptly terminating its own.

If, however, the Reichstag can appeal to the electorate against the President, the President can equally appeal against the Reichstag. As already indicated, he can resolve a deadlock between the two Houses in this method and can also order a referendum on laws relating to the budget, taxes, or salaries. But in every case the President must act on the advice of a Minister, representing the parliamentary majority. His position, therefore, is, so far as the Weimar Constitution can secure it, strictly parliamentary, not, in the American sense, presidential.

There is, indeed, a third alternative which must be briefly noticed. The Constitution of the Swiss Republic, as we have seen, confides the Executive authority neither to a President nor to a Premier, neither to a Cabinet nor to an autocrat. The Ministers who compose the Bundesrat or Federal Council are in effect, though not in form, the permanent heads of certain State departments, and they exist to do the will of the sovereign people whether expressed to them directly by an 'instructed' initiative, or through the intermediation of the elected representatives in the Legislature. In this, as in other respects, Swiss Democracy is direct, but whether such a form of Democracy can exist elsewhere than in a small State, itself the federal aggregate of still smaller States, peculiarly situated alike as regards geography and international relations, is a question which must not detain us.

The
Helvetic
Republic

For the great States of the modern world the choice, let it be repeated, lies between Democracy of the presidential, and Democracy of the parliamentary type.

(Of these two types England and the United States present the predominant examples. There is something to be said in favour of each, and one thing to be said equally in favour of both: both are native, both are racy of the soil in which the culture was developed, both, therefore, may be presumed to correspond with the political necessities of the States which gave them birth.

With the former this work has dealt in some detail, It remains to analyse the latter

The
American
President

Reference was made in an earlier chapter to the formal powers of the President of the United States, and to the method by which he is elected to his high office. From that elaborate machinery the fathers of the Constitution anticipated results almost impeccable. 'This process of election', wrote Hamilton, 'affords a moral certainty that the office of President will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications.' How far has this anticipation been realized? That men of the highest eminence have been elected to the Presidency goes without saying, that many men, quite unknown even to their own countrymen before their selection as candidates, have, after election, filled their great office with dignity, capacity, and even with distinction, proves nothing as to the felicity of this prescribed method of election. It says much, on the other hand, for the wealth of capable citizens produced in the soil of American democracy, and still more perhaps for the prevailing spirit of moderation and good sense—in a word, for the genius for self-government which is the common heritage of the English race. Nevertheless, success in a lottery is, as Bagehot wittily observed, no argument for lotteries, and the Presidential election is essentially a lottery. M. Boutmy ascribes the relative success of the system entirely to the exceptional geographical position of the United States, the simplicity of their international relations, and their happy immunity from the dangers of militarism. But be the results good or bad, they cannot be ascribed to the prescience of the Philadelphia Convention. No part of the system they devised has been more conspicuously modified by events.

The Constitution contemplated a process of indirect election, both stages of which should be conducted with every safeguard for a wise, decorous, and sagacious choice. No anticipations could have been more entirely falsified. In fact, the whole process of selecting presidential candi-

dates and of electing the President is controlled by a series of party conventions, which, starting with the ' primaries ' of the smallest electoral units, culminate in the two great national conventions. From the first stage to the last, the election is in the hands, not of representatives appointed to vote according to their unfettered discretion for the candidate who on scrutiny appeared to them fittest for the office, but of carefully instructed and closely controlled delegates sent up from convention to convention to do the bidding of their parties.

Historically the office of President descends in part from the old Governor of colonial days, in part from the British Crown. English publicists are apt to lay stress, perhaps unduly, upon the latter model.

Genesis of
the office

' It is tolerably clear ', writes Sir Henry Maine, ' that the mental operation through which the framers of the American Constitution passed was this: they took the King of Great Britain, went through his powers and restrained them whenever they appeared to be excessive, or unsuited to the circumstances of the United States. ' ¹

Lord Bryce is in substantial agreement with Maine. ' the President ', he writes, ' is George III, shorn of a part of his prerogative by the intervention of his Senate, in treaties and appointments, of another part by the restriction of his action to Federal affairs, while his dignity as well as his influence are diminished by his holding office for four years instead of for life. Subject to these precautions he was meant to resemble the State Governor and the British King, not only in being the Head of the Executive, but in standing apart from and above political parties. He was to represent the nation as a whole, as the Governor represented the State Commonwealth. The independence of his position, with nothing either to gain or fear from Congress, would, it was hoped, leave him free to think only of the welfare of the people. ' ²

Lord Bryce, it will be observed, more cautious and better informed than Maine, refers to the dual parentage

¹ *Popular Government*, p. 212

² *American Commonwealth*, I. 39

of the President. But he does not go far enough to satisfy some of the more exclusive of American critics. They deny the admixture of royal blood. 'If', says one of them, 'the framers of our Constitution took the President's powers from the powers of the British Crown as described in Blackstone they were great bunglers and could hardly have been able to read the English language'.¹ Mr Fisher would seem to be too eager to disclaim the British origin of the President, but it is undeniably true that for most of the powers conferred upon the President there are ample precedents to be found in 'native' American sources. Similar powers were undoubtedly exercised under the revolutionary Constitutions of 1776-80 by various State Governors.

The
Cabinet

Confirmatory of Mr Fisher's contention is the significant fact that the American Constitution makes no provision for the formation of a Cabinet. It is true, of course, that in 1787 the Cabinet system was by no means fully developed in England. George III was still 'King', though Pitt was rapidly attaining to the position of Premier. Nevertheless the omission of all reference to a Cabinet Council is significant. It would be even more significant were it not that a similar omission is noticeable in the Union Act of 1840—an Act expressly intended to establish the Cabinet system in Canada. In the case of America the omission is, however, plainly deliberate. It was not intended to establish the Cabinet system, and as a fact it never has been established. The American Constitution is consequently not parliamentary but presidential. Its framers preferred the practice of Cromwell to the precepts of Pym, the theory of Montesquieu to the practical expedients of Walpole.

'Those politicians and statesmen', wrote Hamilton, 'who have been the most celebrated for the soundness of their principles and the justice of their views have declared in favour of a single Executive and a numerous legislature. They have, with great propriety, considered energy as the

¹ Fisher, *op cit.*, p. 95

most necessary qualification of the former, and have regarded this as most applicable to power in a single hand ' ¹

Accordingly the Executive was vested in the President. Between him and Congress there was no necessary correspondence, nor was he politically responsible to it. On the contrary such responsibility is expressly repudiated by Hamilton. ' However inclined we might be to insist upon an unbounded complaisance in the Executive to the inclinations of the people, we can with no propriety contend for a like complaisance to the humour of the legislature. The same rule which teaches the propriety of a partition between the various branches of power, teaches us likewise that this partition ought to be so contrived as to render one independent of the other. ' It naturally followed that the Constitution did not provide for anything in the nature of a Cabinet. Under Section 2 of Article II the President ' may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices. ' These principal departmental officers have in course of time developed into something which is now commonly known as the ' Cabinet ', but between the American Cabinet and the English Cabinet there is as little resemblance as between a British Consul and a Roman Consul. The American Cabinet is a mere fortuitous aggregation of the heads of the principal State departments (now ten in number), it is entirely lacking in solidarity and cohesion, it has no vestige of mutual responsibility. Each of the ten Ministers is personally responsible for the work of his department, but not to Congress nor to his colleagues. ' Colleagues ', indeed, in the English sense, an American Minister has none, the administration is technically departmental. Yet if there was one quality more than another which the Constitution hoped to achieve in the Executive, it was unity. Nor has the desire of its architects been thwarted. It has been

¹ *The Federalist*, No LXX

secured by vesting the Executive (apart from the rights inhering in the Senate) in a single person, who, on English analogy, may be said to stand not only for the Crown, but for the Prime Minister, and not least for the Cabinet. To him the several Ministers are individually, not collectively, responsible, and it is he, not his Cabinet, who is responsible to the legal Sovereign, the people of the United States.

Between the American and the English Cabinet there are other differences on which it is unnecessary here to dwell. American Ministers, for example, may not vote and do not sit in Congress, they have no responsibility for initiating Bills or for superintending their passage through the Legislature, they have no oral interpellations to answer and no general policy to defend in parliamentary debate. Each secretary is, however, required to make annually to Congress a detailed report upon the work of his department, even the details of which the Standing Committees of Congress are apt to supervise.

As a rule, the heads of departments are selected by the President from one of the two parties, but that is not due to a desire to secure homogeneity of administration but because the President himself is a partisan and desires to reward his party associates. Consequently, American Ministers do not resemble civil servants so closely as do the members of the Swiss Council. Technically and legally they are the servants, not of Congress, but of the President. Actually, according to Mr. Wilson, they tend to become 'rather the President's colleagues'.¹ 'The early Congresses', writes the same authority, 'seem to have regarded the Attorney General and the four Secretaries (State, Treasury, War, Navy) who constituted the first Cabinets as something more than the President's lieutenants. Their wills counted as independent wills'.² Of such independent volition the Constitution, we must repeat, knows nothing. It recognizes only the President. How far, in any given administration, ministers are his colleagues, how far his servants, evidently depends neither

¹ *Congressional Government*, p. 46

² *Ibid.*, p. 257

upon law nor upon convention, but upon the respective personalities of President and Secretaries

The Constitution enjoins that 'the President shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient' This provision has now developed into the Presidential Message, which is regularly sent, or on occasions personally delivered, to Congress at its opening Session, something after the manner of the King's Speech Between a Presidential Message and a King's Speech there is, however, one essential difference The President may recommend legislative measures, but he has no power to compel attention to his recommendations If Congress chooses to ignore them, nothing happens The King's Speech, on the other hand, is framed by Ministers who are themselves responsible for the initiation and the conduct of the legislation which they recommend to Parliament

The
President
and
Congress

If, however, the President cannot initiate legislation, the Constitution arms him with a very important negative control The Presidential veto was borrowed from the Constitution of the State of Massachusetts It is not absolute, nor even suspensive, but is liable to be overborne by a two-thirds majority in both houses of Congress None the less the veto does constitute a powerful weapon in the hands of a strong President In the course of a century and a quarter the prerogative has been exercised nearly six hundred times, and, except in the case of Andrew Johnson, with rare discrimination¹ Only on thirty-two occasions has Congress passed a Bill over the head of the President's veto, and of these five were in the Presidency of Pierce and fifteen in that of Andrew Johnson²

Thus the President checks Congress, and the authority

¹ Grover Cleveland holds the record for the exercise of the veto J A Spender (*The Public Life*, 1899) mentions the fact that during the ninety-six years 1788-1881 the entire number of veto messages was 132 In four years Cleveland sent in 301 veto messages, and in addition practically vetoed 189 Bills by inaction, i.e. withholding his consent

² Kimball, *op cit*, p. 205

of Congress balances that of the President. As a modern writer of high authority has summarized the situation 'A mere majority of Congress cannot make any law if the President disapproves, and the President cannot obstruct legislation if it be favoured by two-thirds of the two branches of Congress.'¹ These provisions are in complete harmony with that principle of balance and equipoise which runs all through the American Constitution. The President, being the centre of the Executive machinery, cannot legislate, he cannot even initiate legislation, but he may suggest it. He cannot veto legislation, but he can postpone it. Postponement is a most valuable weapon. Democracies are apt to be in a hurry, but if they are compelled to reflect, the result is not infrequently negative. Whether postponement is effected by the suspensive veto of a President, by the authority of a Second Chamber, or by a direct reference to the electorate, matters little. Second thoughts are apt to defer if not to discourage legislation.

The
President
and
Foreign
Policy

A similar balance operates in reference to the executive side of Government. Congress can do nothing, under ordinary circumstances, to control the action of the President. Yet the President, as we have seen, can make no treaty without the concurrence of two-thirds of the Senate, nor can he declare war. The latter function belongs to Congress, though Congress can exercise no influence over the policy, still less over the conduct of negotiations, which may render war inevitable. So much has been written in preceding chapters about the treaty-making power and the conduct of foreign relations that a brief reference may here suffice.

The Presidential system, like the Cabinet system, has during the last twenty years been put to a severe test. Which system has reacted the more successfully? The question is obviously delicate, but it is inevitable, and no publicist can shirk it.

To those who observed the working of the two systems,

¹ J. M. Beck, *The Constitution of the United States* (1924), p. 233.

fifty, or sixty years ago, their respective merits did not appear doubtful. The late Marquis of Salisbury, then Lord Robert Cecil, and a Tory of Tories, was at one with a philosophical radical like Walter Bagshot in commending the superiority of the Cabinet system. Writing in the *Quarterly Review* for July 1864, Lord Robert Cecil commented as follows upon the control exercised by the House of Commons over the Executive:

'The control which it possesses, if it pleases to exert it, is quite absolute. By a simple vote it can paralyse a single department or all departments of the civil service. The possession of such a power confers inestimable advantages upon us. It brings the nation and the Government into so close a connexion, that any policy which is approved by the mass of the nation is certain to be promptly adopted by its rulers. Other countries have tried to produce the same result by providing that the ruler shall be periodically elected by the people. The contrivance fails in two ways. It makes no provision for changes of opinion which may take place between the intervals of election, and it takes no note of any public opinion except such as can make itself heard over the din of artificial cries which it is the professional duty of an organized body of electioneers to raise. No one can at present say whether the genuine public opinion of the Northern States of America is for war or peace. In England, the machinery which carries the will of the nation into the policy of the Government is *far more sensitive*. No Government could exist in England for three months that was acting in the face of a decided national conviction.'

Eighteen months later (January 1866) Lord Robert Cecil reaffirmed his conviction in a not less striking passage:

'Our system is constructed to carry out in the policy of the Government the actual opinion, at the moment, of the million and a quarter of electors by whom the nation is ruled. *It is a machine of the most exquisite delicacy.* The conduction from the electors, who are the source of power, to the Ministers, is so perfect that while Parliament is sitting they cannot govern for ten days in opposition to the public will.'

Walter
Bagehot

Bagehot, also writing in the Palmerstonian era, was not less emphatic than Lord Robert Cecil in his preference for the Cabinet system, and in particular for what he conceived to be its specific quality—the fusion and combination of the executive and legislative powers. The Cabinet system manifested its superiority alike in quiet times and in days of crisis and stress. If you divorce the Executive from the Legislature you injure both.

‘The executive is crippled by not getting the laws it needs, and the legislature is spoiled by having to act without responsibility: the executive becomes unfit for its name, since it cannot execute what it decides on, the legislature is demoralized by liberty, by taking decisions of which others, and not itself, will suffer the effects.’¹

Even if disputes should temporarily emerge, harmony is likely to be restored by the fact that ‘on a vital occasion the executive can compel legislation by the threat of resignation and the threat of dissolution.’ The Presidential system provides no such safety-valve. Then consider the educational influence of Cabinet Government; it educates the Legislature, it educates the electorate. A change of Executive in England is usually preceded and effected by prolonged debates in Parliament, debates which find their echo in the Press and in the constituencies. The more important debates in the House of Commons issue in action, and are regarded mainly for their possible effects upon action. In the American Congress they are not regarded at all, mainly because no action can result from them.²

Woodrow
Wilson's
opinion

Mr Woodrow Wilson, writing twenty years later than Bagehot, concurred in his estimate of the relative merits of Presidential and Cabinet Government. ‘The discussions which take place in Congress are aimed at random. To attend to such discussions is uninteresting, to be instructed by them is impossible.’³ He detected, however,

¹ *The English Constitution*, p. 17.

² Exceptions are of course to be found in the Senatorial debates on treaties, and in debates preceding a declaration of war.

³ *Congressional Government*, pp. 298, 299.

a steady concentration of all the substantial powers of government in Congress,¹ and he broadly hinted that the distempers of Congress would, before long, be remedied, as the distempers of the post-revolution Parliament of England had been cured by the evolution of a Cabinet system.² Events have not justified his anticipation.

Meanwhile, by a curious turn in the wheel of criticism the Presidential system was beginning to find apologists among English publicists. Sir Henry Maine published his *Popular Government* in 1885, and no one can fail to be struck by the diminishing enthusiasm there displayed for the English as compared with the American type of Democracy. The success of the Federal Constitution has been 'so great and striking' as almost to render mankind oblivious of the general failure of republican institutions.³ He lauds the sagacity of the authors of the *Federalist*, a sagacity which 'may be tracked in every page of subsequent American history' and 'may well fill the Englishman who now lives *in facie Romuli* with wonder and envy'.⁴

Sir Henry
Maine

Mr Lecky's *Democracy and Liberty* (1896) struck a similar note. It lauded the 'eminent wisdom of the Constitution of 1787' and attributed to it much of 'the success of American democracy'. To the safeguards contained in 'an admirable written Constitution' 'America mainly owes her stability'. By reason of the absence of such safeguards England is pre-eminently exposed to the dangers of constitutional innovation, of fiscal injustice, and of confiscatory legislation.⁵

W E H
Lecky

The change of tone between Lord Salisbury and Bagehot on the one hand, and on the other Maine and Lecky, is unmistakable. The ardent and confident enthusiasm of the earlier writers had given place to the tempered pessimism of the later. To the former the superior qualities of the English Constitution, more particularly in relation to the position of the Executive and its relation to the Legis-

¹ *Op cit.*, p. 56
² p. 202

³ p. 251

⁴ *Op cit.*, pp. 314, 369
⁵ Vol. I, pp. 55, 96, 112

lature, were indisputable, the latter were beginning to discover in the relative stability of the American Constitution a virtue of which English Government could no longer boast. How are we to account for the transition effected in a short generation? Must we ascribe it to Disraeli's 'leap in the dark', to the addition of one million votes to the electoral roll under the Act of 1867, to the addition of another two millions, mainly agricultural labourers, under Gladstone's Act of 1884?

Many good judges have indeed held, as was indicated in a previous chapter, that Parliamentary Government reached its meridian during the middle years of Queen Victoria's reign, that the equipoise of the forces on which it rests was never so perfect as between 1832 and 1867. Be that as it may, it is plain that the tone even of the friendliest critics is less confident, though it is noticeable that those who know the Presidential system most intimately are least ready to criticize the only real alternative—the Parliamentary or Cabinet system as it operates in England.

The
Adminis-
trative
Auto-
cracy of
Prussia

It would be affectation to pretend that the problem of the Executive is easy of solution. On the contrary, every form of Executive—autocratic Kingship, the Parliamentary Cabinet, the President, monarchical or elected—offers a target for criticism to those who have primary regard for efficiency of administration. Perhaps, in the technical sense, no country was ever better administered than Prussia under its Hohenzollern kings. The Prussia of the eighteenth century showed administrative absolutism at its best. Yet even that system had its weak points. Jena revealed them. Civil and military administration had alike broken down. The military disasters at Jena and Auerstadt taught Prussia her lesson. Napoleon's presence in Berlin enforced it. The genius of Stein, Hardenberg, Schanhorst, and Humboldt enabled the Hohenzollern Kingdom to draw from disaster every possible advantage, and in the subsequent Prussianization of Germany the efficiency of a Civil Service, as near perfection

as brains and industry could make it, gave admirable and indispensable support to the organizers of war and the commanders in the field

In the making of war, still more in the preparation for war, the palm must be conceded to the autocracy which can command the service of efficient administrators. Its merits as a form of Executive were brilliantly exemplified by the preparations of the triumvirate Bismarck, Roon, and Moltke for the series of wars which transferred the headship of Germany from Vienna to Berlin, and the primacy of continental Europe to Berlin from Paris. Even more brilliantly was the efficiency of the Prussian machine exemplified by the patient preparations which preceded the Great War of 1914.

Auto-
cracy and
War

In sheer military capacity the French Staff was probably at least equal to that on which the Kaiser could rely. But, apart from the palpable inferiority of her administration, France was handicapped by a parliamentary Executive. Even in France, where the war was regarded as inevitable and where preparation for it was made with hardly less of consistent purpose than in Germany, the work of the soldiers was impeded by the politicians. A parliamentary Executive must always have primary regard to Parliament, to conciliating the support first of deputies or members, and then of the electorate. The General Staff might work and warn, a War Office might do its best to maintain the military machine in readiness and efficiency, but always in the background was the Legislative Body, the politicians who were ever critical of the Executive, the politicians who held the purse-strings.

Parli-
mentary
Demo-
cracy and
War—
France

If this was so in France, which lived in constant dread of an attack upon her frontiers, and where every elector was a trained soldier, much more was it in England, which had long since forgotten what it was to be at war with a great military Power, and where the politicians were anxious only to persuade themselves and their democratic masters that no danger was to be apprehended from the Hohenzollern Empire.

England

We may take it then as indisputable that in the preparation for war an autocracy enjoys a manifest advantage over any other form of Executive. That is true also of the conduct of war, particularly in the earlier stages of the contest. Those advantages diminish, however, as the struggle is prolonged. The reason is obvious. War compels every Government to assume something of the characteristic quality of an autocracy. *Inter arma silent leges*. We have already seen how, under the stress of war, the Cabinet system was transformed in England into a Directory. Votes of credit were passed by the House of Commons virtually without discussion. The rapidity with which an industrial machine designed for peace times, and a commercial machine based on the presupposition of perpetual peace, were adapted to war conditions, evoked the wonder and admiration of all who witnessed the transformation. The transformation will, in truth, constitute an abiding monument to the administrative genius of the British race. But the effort was enormously costly, whether computed in terms of men or money. Three out of the six or seven members of the Directory have already,¹ by premature death, paid the price demanded by such an effort. Ten thousand millions of money represented the expenditure in cash. The brunt of the struggle was borne by two parliamentary democracies, in the final round of the contest indispensable help was given by the great Democracy which affords the most eminent example of the success of Presidential Government.

Thus the respective merits of a Presidential and a Parliamentary Executive in the conduct of war cannot be dogmatically determined by the events of recent history. The conduct of war constitutes, however, a relatively unimportant factor in the aggregate of the problem of Government, and it is a factor which all men hope may diminish in significance. It is more to the purpose, therefore, to inquire which system responds the more successfully to the demands made upon it in ordinary times.

¹ By 1925

Few will deny that the American Constitution showed itself in its least dignified and efficient aspect in relation to the world-settlement after the Great War. The representatives both of France and of the British Empire—of the Empire in its integrity and in its component parts—exhibited, on the contrary, one characteristic excellence of the Parliamentary System. They could negotiate without fear that the results of their efforts would be repudiated by the peoples in whose names they spoke and signed. The initial and perhaps irremediable mistake of President Wilson was in crossing the Atlantic still, it was the mistake of a generous spirit and an over-active brain. Mr. Wilson was essentially a solitary worker, he never appreciated the value of team-work. There was nothing in the American Constitution to compel or even to encourage him to learn the lesson. He had come, with only a brief experience of public life, almost straight from a college class-room to the White House. His mind was eminently academic, and his habits those of the secluded student. But the personal characteristics of the individual cannot be held responsible for the failure of the system. Mr. Lloyd George could speak in the Councils of Europe as the representative of a Parliamentary majority which had received a recent and unmistakable mandate from the electorate. His word was the bond of Britain. Mr. Wilson's word, however weighty, carried only the weight of his personal character, his bond was repudiated without hesitation by those with whom the American President shares the treaty-making power. That the possibility, nay the probability, of such an issue to the President's European mission was foreseen, detracts nothing from the humiliation to which it exposed both the President and the people of the United States. The Parliamentary Democracies of Europe, having paid insufficient regard to the divergences between the American Constitution and their own, were taken aback by a result the possibility of which was never remote.

The
Treaty of
Versailles

Again, however, it may be said that treaty-making is

only an occasional incident in the business of State. That is true, though it may be hoped that it may always be a less infrequent incident than war. But as regards the conduct of diplomacy, and particularly of the diplomacy that issues in important international treaties, the superior advantages of a Parliamentary Executive would seem to be indisputable.

The Executive in
times of
Peace

The respective merits of the two systems are less easily assessable in relation to the workaday business imposed upon Governments in times of peace. Both are in some degree obnoxious to the charges commonly urged against the Executives of democratic Governments; that they are deficient in courage, in promptitude, in continuity, and in efficiency. From all these points of view administrative absolutism, when it reaches the standard of excellence exhibited, for instance, by pre-war Germany, has much to recommend it. To a casual but highly cultivated observer, Germany, on the eve of the war, appeared to be more efficiently administered than either England or France.¹ A careful and comparative analysis of health, housing, and mortality statistics, say in London and Berlin, or in Manchester and Leipzig, might perhaps have corrected the impression derived from Wiesbaden or Homburg.

Views of
Lord
Bryce

The choice for the modern world lies, however, as we have repeatedly insisted, not between absolutism and democracy, but between different types of democracy. Lord Bryce, writing with intimate personal knowledge of the two most eminent examples of the most sharply contrasted types, has summarized his conclusions with characteristic felicity and impartiality.

Strength
of the
Cabinet
System

The Parliamentary type seems to him to be calculated to secure 'swiftness in decision and vigour in action', it concentrates responsibility, it enables the Cabinet to pass through such legislation as it thinks needed, and to conduct both domestic administration and foreign policy with a maximum of vigour and promptness, it brings Ministers

¹ Owen Wister, *The Penitentiary of Calamity*

into constant contact not only with members of their own Party but with members of the Opposition, and by the system of parliamentary interrogation it ventilates the grievances of electors and then representatives, and keeps Ministers and officials up to a high pitch of alertness and efficiency, it enables the Nominal Executive, be he King or President, to remain outside the range of party politics, and to assist the transitory Ministers with advice based upon a longer and more continuous experience of public affairs, it renders the transfer of power from one Party to another, in accordance with the expressed will of the electorate or even the Legislature, simple, rapid, and orderly. In this latter respect Parliamentary Democracy combined with Hereditary Monarchy enjoys conspicuous advantages as compared with a Parliamentary Republic.

The merits of the Parliamentary system are balanced by its serious defects. This system intensifies the spirit of Party which not only clogs the wheels of legislation but hampers administration, if it does not actually engender corruption, it may well dispose the Executive to seek popularity at the expense of efficiency, finally, 'the very concentration of power and swiftness with which decisions can be reached and carried into effect is a source of danger. There is no security for due reflection. Errors may be irretrievable.'¹

The Presidential system, on the other hand, 'was built for safety not for speed', but the 'Separation of Powers' on which it is based has proved inconvenient by impeding the co-operation of representatives and administrators, it has for some purposes turned out to be 'not the keeping apart of things really distinct but the forcible disjunction of things naturally connected'. What is the result? 'Delay, confusion, much working at cross purposes'—results particularly noticeable and deplorable in the sphere of finance. There is, however, a real gain in efficiency of administration from the fact that Ministers are not distracted by the necessity of constant attendance in the

Its defects

The Presidential system

¹ *Modern Democracies*, II, c. lxviii

Legislature, and in efficiency of legislation by concentrating the minds of legislators upon their special function. A large part of the time of an English Cabinet is taken up by the consideration of parliamentary tactics, much of the thought and time of members of Parliament is devoted to plans for upsetting one administration and installing another.

Moreover, despite the fact that party organizations are even stronger in the United States than in England, party discipline is weaker at Washington than at Westminster. There is also a greater sense of stability. Congress is elected for a fixed term, the President is elected for a fixed term. 'A shifting of the political balance can take place only at elections, points fixed by law,' but those fixed points afford a definite opportunity for the reconsideration of policy, administrative or legislative. Consequently, moderation is likely to characterize both. 'The country need not fear a sudden new departure: the demagogue cannot carry his projects with a run.' Yet responsibility to the people would seem to be better secured under the Parliamentary than under the Presidential system, since responsibility is concentrated in a Cabinet which controls both administration and legislation, or which, failing to control legislation, can refer the matter to the electorate. Should the President or the Congress, in America, flout the will of the people by whom they are severally elected, the electors must await the end of the legal term before responsibility can be brought home.

Conclu-
sion

The experience hitherto acquired of these competing systems of government is not perhaps sufficient to warrant any general conclusion, but subject to this warning, Lord Bryce, with characteristic caution, reaches the conclusion that the Swiss system is the only one which brings out the popular will in 'an unmistakable and unpervertible form', but that for a large country the cumbrousness and cost of the Referendum are 'practically prohibitive'. As between Parliamentary and Presidential Government he holds that

the 'former' 'has many advantages for countries of moderate size', while the latter, 'constructed for safety rather than promptitude in action, and not staking large issues on sudden decisions, is to be preferred for States of vast area and population, such as are the United States and Germany'

From a conclusion so cautiously reached and so tactfully stated it is difficult to dissent. Yet the Wilson episode has undoubtedly tended to accentuate the apprehensions of those, on both sides of the Atlantic, who feared lest the Presidential system, when subjected to the test of an external crisis, might fail to react successfully. It would be unsafe to assume that the Parliamentary system might not, if subjected to an equally severe test, reveal weakness of a kind totally different and much more fatal to the stability of the Commonwealth. Thus far, Parliamentary Democracy in combination with Constitutional Monarchy has wonderfully justified itself in the country of its origin. Abroad it has emerged successfully from the ordeal by battle, it has not surrendered to the forces of disruption and spoliation at home. Yet it is difficult to regard without misgiving the immediate future, so far as that future depends on the perfection of constitutional machinery. Political thinkers who look for inspiration to Burke are apt, in proud reliance upon the *ethos* of a people, to underestimate the importance of constitutional checks and balances. If the people mean mischief, they will work it, no constitutional safeguards can avail against the will to revolution. The school of Hamilton view the matter differently. To them a Constitution is as the ark of the Covenant. Storms may beat upon it, they shall not prevail. Four generations of people in the United States of America have been born into this tradition and educated in this conviction. But is it on the conviction or on the Covenant that the guarantee for stability really rests? A prophecy tends to fulfil itself, a political conviction affords the soundest anchorage for the ship of State. Convictions may derive from a Document, but they can be sustained in the long

run only by an appeal to reason. That appeal will lie, whether the Constitution be embodied in a Covenant, or rests upon conventions which are themselves the product of long centuries of compromise, of concession, and of continuous readjustment to ever-changing conditions. The spirit of a people is, as a political force, more elusive than the letter of a Constitution. It has yet to be proved that it is less sure as a shield in adversity, and less efficacious as a barrier against the folly and violence of extremes.

XXVII THE PERMANENT EXECUTIVE (1)

The English Civil Service

'Read any history of England in the last century, you will gather the impression that the Cabinet and the House of Commons have been the only operative instruments of our Government, you will hear nothing about the permanent officials everything about the politicians'

—RAMSAY MUIR

'Of all the existing political traditions in England the least known to the public, and yet one of those most deserving attention is that which governs the relation between the expert and the layman the relationship between the titular holder of a public post, enjoying the honours and assuming the responsibility of office, and a subordinate who, without attracting attention, supplies the technical knowledge and largely directs the conduct of his chief, extends throughout the English Government from the Treasury Bench to the Borough Council'

—A. L. LOWELL

'As matters now stand the Government of the country could not be carried on without the aid of an efficient body of permanent officers, occupying a position duly subordinate to that of the Ministers who are directly responsible to the Crown and to Parliament, yet possessing sufficient independence, character, ability and experience to be able to advise, assist, and to some extent influence those who are from time to time set over them'

—*Northcote-Trevelyan Report* (1853)

AUTOCRATIC Sovereigns, elected Presidents, Parliamentary Cabinets have this in common they all perform their functions, in these modern days, under the glare of publicity. An American President, an English Minister, can only reach his constituents, can only influence that public opinion, upon which his own power ultimately rests, through the megaphone of the Press. In each case, however, his success in administration depends upon the loyal and skilful co-operation of a body of officials whose tenure is virtually permanent, who in their several departments have a technical and expert knowledge of the work which the political chiefs of the State must necessarily approach as amateurs.

With these expert, permanent, and silent officials, with the men who carry on the daily work of Government, and

The Civil
Service

with the main departments in which their work is organized, the present chapter will be concerned

Its history unwritten

It is a significant and illuminating fact that the history of the English Civil Service still remains to be written. Whitehall is indeed a mushroom growth compared with Westminster, but while the High Court of Parliament has formed the subject of innumerable treatises in many languages, the history of the development of the Civil Service must still be sought in Blue Books, in the Reports of Royal Commissions, of Departmental and Select Committees, and similar publications, the popularity and accessibility of which are by no means commensurate with their intrinsic value. There are, indeed, excellent chapters on this subject in general works on English Government, but the Civil Service still awaits a chronicler who will treat the subject comprehensively and on a scale adequate to its importance. Meanwhile, no work on the mechanism of the State can ignore one of the most vital portions of the machine, and the organization and staffing of the great departments of the Central Government must, therefore, now claim our attention.

The Political Executive

The mainspring of the administration is supplied by the Cabinet. This body, regarded as a unit, acts as the political committee which rules the United Kingdom and the British Empire. Apart, however, from membership of this Committee, an English Cabinet Minister acts, individually, in a threefold capacity: he is an adviser of the Crown, he is a Parliamentary and Party leader, and finally he is, with certain exceptions, the head of an administrative department.

The Cabinet has, in modern days, generally included the following officials: the Prime Minister, the Lord High Chancellor, the Lord President of the Council, the Lord Privy Seal, the First Lord of the Treasury, the First Lord of the Admiralty, the Chancellor of the Exchequer, the Chancellor of the Duchy of Lancaster, the Secretary for Scotland, the First Commissioner of Works, six Secretaries of State—for Home Affairs, Foreign Affairs, Colonies, War,

India, and Air, three Presidents of Committees of the Council—the Boards of Trade, Agriculture, and Education, the Minister of Health, and the Minister of Labour. The Prime Ministership is, as we have seen, invariably combined with another office, generally with the First Lordship of the Treasury. Other offices are sometimes, but more rarely, combined in one person. Nor do all the above offices invariably carry with them the right of admission to the Cabinet. The First Commissioner of Works, the Postmaster-General, and the various Presidents of Boards have at times, during the last forty years, been excluded from the Cabinet. On the other hand, the Attorney-General, the Chief Secretary to the Lord-Lieutenant of Ireland, the Lord Chancellor of Ireland, and the Lord-Lieutenant himself have been included in one or more recent Cabinets. In addition to the above, the following are also included in the Ministry, although they have never been admitted to the Cabinet: the Financial Secretary to the Treasury,¹ the Patronage Secretary, and three Junior Lords of the Treasury, the Parliamentary Under-Secretaries to the Home, Foreign, War, Colonial, India, and Air Offices, to the Boards of Trade, Education, and Admiralty, and to the Ministries of Health and Labour, the Civil Lord of the Admiralty, the Paymaster-General,² Assistant Postmaster-General, the Attorney-³ and Solicitor-Generals for England and Ireland,⁴ the Scottish Lord-Advocate and the Solicitor-General for Scotland, the Financial Secretary of the Army Council, and certain officers of His Majesty's Household. The above Ministers may, most of them must, have seats in Parliament. They are Party leaders who go into and out of office, according to the mutations of party.

¹ The Financial Secretary was admitted exceptionally in 1923 when virtually acting as a Deputy Chancellor of the Exchequer to the Chancellor who was also Prime Minister.

² The Paymaster-General was sometimes in the Cabinet: e.g. Lord J. Russell in 1832, Sir E. Knatchbull in 1841, Macaulay in 1846, and Lord Granville (1851), but Granville was, it would seem, the last.

³ Since 1912 the Attorney-General for England has been frequently included, but to his inclusion grave exception has been taken.

⁴ Until 1922.

majorities in the House of Commons. It is rare for any one Minister to hold any one office continuously for more than four or five years. Even if his own party is returned for a second tenure of office the individual Minister is not infrequently shifted from one office to another. The Earl of Halsbury and Lord Ashbourne held the Lord Chancellorships of England and Ireland respectively for a continuous period (broken only by one three-years' interval) of twenty years, but such instances are rare, and likely to become rarer. A Minister is, always, a bird of passage through the department over which he temporarily presides, and generally of rapid passage. Parliamentary Government, Disraeli was wont to say, would be impossible but for the recess. A parliamentary Executive would be impracticable were it not for the existence of a permanent Civil Service.

'As matters now stand the Government of the country could not be carried on without the aid of an efficient body of permanent officers, occupying a position duly subordinate to that of the Ministers who are directly responsible to the Crown and to Parliament, yet possessing sufficient independence, character, ability, and experience to be able to advise, assist, and to some extent influence those who are from time to time set over them' ¹

The Civil Service, as we know it to-day, may be said to date from the Report of the eminent public servants just quoted. Many of the individual Departments of State, as will be shown presently, were in fact in existence long before 1853, but 'before that date the administrative and clerical staffs presented no unity of organization, no regularity of recruitment, and (save as to the expenditure of public money) no common principle of control' ²

The permanent officials

The Civil Service, in the widest sense of the word, now includes all permanent employees of the Government, from the Under-Secretary of State for Foreign or Home Affairs, with his £3,000 a year, down to a Post Office sorter or

¹ *Report* by Sir Stafford Northcote and Sir Charles Trevelyan on the organization of the Permanent Civil Service (1853), p. 3

² Royal Commission on the Civil Service, *Fourth Report*, p. 5 [Cd. 7338], 1914

a Home Office charwoman Throughout this Service there are two dominant principles—amounting in some cases to rules—permanence of tenure (during good behaviour), and abstention from party politics Under an Act of 1705 and many subsequent Acts all 'placemen', with the exception of holders of certain high political posts, were excluded from Parliament, while partly by Service regulations, partly by convention, civil servants are required to abstain from all participation in party politics An Act of 1710 rendered liable to fine and dismissal any Post Office official who shall 'by Word, Message, or Writing or in any other manner whatsoever endeavour to persuade any elector to give or dissuade any elector from giving his vote for the choice of any person to sit in Parliament' An Act of 1782 disfranchised Revenue officials Out of 160,000 electors no fewer than 11,500 were at that time officials of Customs and Excise, and no fewer than seventy elections were said to be dependent upon their votes¹ With a franchise largely extended the difficulty has been minimized, and an Act of 1868 removed the disqualifications imposed in 1782, while Police officials were for the first time enfranchised in 1887 But the danger, though mitigated, has not been entirely removed It has indeed in late years been emphasized, partly by the enormous extension of Government activities and the consequent multiplication of Government employees, and partly by the growth of the principle and habit of trade-association The danger is, so far, most clearly apparent in the dockyard constituencies where high political considerations are commonly said to be subordinated to trade questions of hours, wages, and conditions of employment The members for 'dockyard' boroughs are easily distinguishable in the House of Commons for their zeal on behalf of the dockyardsmen This may be inevitable, but it raises large questions not easily dismissed The agitation among the employees of the Post Office affords another symptom of the same disease The Postal and Telegraph Service now

¹ Erskine May, *Constitutional History*, 1 348

employs about 185,000 persons, and as an impartial observer remarks, 'it is not difficult to perceive that such a power might be used in directions highly detrimental to the State. There is no reason to expect the pressure to grow less, and mutterings are sometimes heard about the necessity of taking away the franchise from Government employees. That', adds President Lowell, 'would be the only effective remedy, and the time may not be far distant when it will have to be considered seriously'.¹ When it is, the difficulties encountered in the daughter-lands, and the ingenuity with which, in one instance, they have been met, will deserve and doubtless will receive attention.

Recruit
ment for
the Sea-
vice Pa-
tronage

Only since 1855 have the appointments to this service been placed on a satisfactory footing. Down to that time the principle of private patronage prevailed, and it was not entirely eliminated until 1896. Thus Lord John Russell wrote in 1823:

'Offices in the Post Office, the Stamp Office and the Customs especially are made part of the patronage of Members of Parliament voting in favour of Government. Even the patronage of the smaller offices is a powerful means of persuasion with that numerous class of men who prefer a favour from Government to any other means of earning their bread. The Minister, seeing his advantage, has of late years more completely organized and adapted this kind of patronage to the purpose of parliamentary influence. When an office in the Stamp or Post Office is vacant the Treasury write to the member for the County or Borough voting with the Government and ask for his recommendation'.²

A few years later (1829) the Duke of Wellington wrote to his colleague, Sir Robert Peel, to complain that the 'whole system of the patronage of the Government was erroneous'. But the point of his complaint was that the patronage fell to private members who did not always vote with the Government. The effect of such methods of appointment upon the efficiency of the public service was held up to public scorn in 1849 by Sir Charles Trevelyan,

¹ *Government of England*, 1 153
History of the English Government, pp. 402-3

then 'Permanent Secretary to the Treasury' He condemned the service as overstaffed in numbers, inactive, and incompetent, and urged that the first necessary step towards reform was to ensure that only properly qualified persons should be appointed

'There is', he wrote, 'a general tendency to look to the public establishments as a means of securing a maintenance for young men who have no chance of success in the open competition of the legal, medical, and mercantile professions There being no limitation in regard to the age of admission in the great offices of State, the dregs of all other professions are attracted towards the public service as a secure asylum, in which, although prospects are moderate, failure is impossible, provided the most ordinary attention be paid to the rules of the Department The prizes of the profession have long been habitually taken from those to whom they properly belong and have been given to members of the political service We are involved in a vicious circle The permanent Civil servants are habitually superseded because they are inefficient, and they are inefficient because they are habitually superseded'

To remedy these defects Sir Charles Trevelyan suggested the imposition of an age limit on first appointments, the institution of an examination in literary and scientific subjects preliminary to appointment, and the enforcement of an effective period of probation before the confirmation of the appointment Some years were, however, to elapse before these suggestions were acted upon

Meanwhile, the principle of a competitive examination for appointments had been tentatively introduced into the service of the East India Company The Charter Act of 1833 provided that four candidates should be nominated by the Board of Directors, or, failing them, by the Board of Control, to each vacancy in the Company's College at Haileybury, and that nominees should be subjected to competitive examination The novel principle was thus justified by Lord Macaulay, who was primarily responsible for its introduction

Open
compe-
tition for
the
Indian
Service

'It is said, I know, that examinations in Latin, in Greek, and in mathematics are no tests of what men will prove to be in life

I am perfectly aware that they are not infallible tests, but that they are tests I confidently maintain. Look at every walk of life, at this House, at the other House, at the Bar, at the Bench, at the Church, and see whether it is not true that those who attain high distinction in the world are generally men who were distinguished in their academic career. Indeed, Sir, this objection would prove far too much even for those who use it. It would prove that there is no use at all in education. Why should we keep a young man to his Thucydides or his Laplace when he would rather be shooting? Education would be a mere useless torture if at two or three and twenty a man who has neglected his studies were exactly on a par with a man who has applied himself to them, exactly as likely to perform all the offices of public life with credit to himself and with advantage to Society.

The system introduced by Macaulay was, after a few years' trial, suspended, but the principle for which he pleaded was accepted in 1853 when open competition for the recruitment of the Indian Service was finally and permanently adopted.

The
North-
cote-
Trevelyan
Report,
1853

The English Civil Service reached the same goal by much more gradual stages. The first stage was marked by the Report of Sir Stafford Northcote and Sir Charles Trevelyan who in 1853 were commissioned by Mr Gladstone, then Chancellor of the Exchequer, to inquire into the organization of the permanent Civil Service and to report upon the best method of recruiting it. 'The Report of these Commissioners, dated 23 November 1853, is the foundation upon which the structure of the existing Civil Service has been built.'¹ The Commissioners found that 'admission to the Civil Service was indeed eagerly sought after, but it was for the incompetent and the indolent or incapable that it was chiefly desired'. No effort was made in the first instance to secure fit persons for the public service or to turn to the best account any abilities which the persons appointed might happen to possess. Patronage was evidently the root of the evil, and the Commissioners, therefore, recommended that patronage should be abolished and that the Service should be recruited by competitive

¹ Fourth Report of 1914, p. 7

examination open to all candidates, subject only to a test of age, health, and character. They further recommended that a clear distinction should be drawn between the intellectual and routine work of the Civil Service, that a corresponding division of labour in public offices should be insisted upon, and that two types of examination—one for the higher and another for the lower appointments in such offices—should be instituted.

The subsequent developments in the organization of the Civil Service have followed precisely the lines indicated by Northcote and Trevelyan, but that development was slow and irregular. The first and not the least important step was taken in 1855, when by an Order-in-Council of 21 May the Civil Service Commission was created to conduct the proposed examinations. This was followed in 1859 by the Superannuation Act which made pensionable rights in the permanent Civil Service dependent upon a certificate from the Commissioners. Not, however, until 1870 was the competitive test made obligatory by an Order-in-Council, and not until 1876 was the principle of differentiation of functions within the several offices, to which the Northcote-Trevelyan Report had attached the highest importance, generally accepted and applied. The Royal Commission of 1886 found indeed that the application was still partial, and the lines of differentiation far from satisfactory. Certain improvements were accordingly adopted.

The Civil
Service
Commis-
sion

A quarter of a century elapsed before yet another of a long series of Commissions was appointed under Lord Macdonnell. The Commissioners reached the conclusion that despite 'various defects, some of considerable importance', the fundamental principles upon which the Civil Service was based were sound, and its organization was in the main efficient. The action which, over a series of years, had been taken to improve the service had resulted, in their judgement, in the creation of a 'competent, zealous, and upright body of officers'. Nor did they doubt that to this result the system of open competition had 'most materially contributed'.

The
Royal
Commis-
sion of
1912-14

The detailed recommendations of the Macdonnell-Commission, like those of the Treasury Committee appointed under the Chairmanship of Lord Gladstone (January 1918) to review the situation created by the war, are too technical and detailed to justify consideration in a work like the present. It is, however, indicative of the movement of opinion in the last twenty years that the Macdonnell Commission should have laid particular emphasis on the importance of bringing the several examinations for Civil Service appointments of different grades into closer and more logical correspondence with the educational system of the country. Only in this way, it was held, could 'the interests of democracy and of the Public Service' be reconciled, and the best brains of the country, in whatever rank of Society they might emerge, be made available for the service of the State.

That the Civil Service does now open a career to talent cannot be disputed. The educational ladder is now sufficiently substantial to enable boys and girls of conspicuous ability to mount by successive rungs to the Universities, and from the Universities to qualify for admission to the highest grades of the Civil Service. There are, indeed, sections of opinion to which the idea of competition, even in connexion with an examination system, is abhorrent, but those who dislike the competitive principle have not yet formulated any alternative which would not reproduce, though possibly under different forms, many of the defects inherent in the old system of patronage. The only alternative to competition is selection, and selection must, in one form or another, involve patronage. The doctrinaire opponents of the competitive principle will, therefore, be well advised to scrutinize closely the records of the past before embarking on a path beset by many unsuspected pitfalls.

Organiza-
tion of
the Civil
Service

Within the Service itself there are now various grades, the initial recruitment for which is from differing intellectual, though not invariably different social, spheres. The classification has been reorganized since 1920 in accordance

with the recommendations of the Civil Service National Whitley Council,¹ and the several compartments are no longer watertight. On the contrary the principle is now fully and frankly accepted that material hindrances must not be allowed to block merit and ability, and that persons recruited to the Service at different ages and by different tests shall be placed on an equality as regards opportunity of promotion to higher posts. A few of the highest posts are still occasionally filled by nomination, for more, there is a combination of selection and competitive examination, but the great bulk of the appointments are made on the results of open, competitive, written examinations. The service is now open both to men and women.

The administrative and clerical work of the Civil Services falls broadly into two main categories. To one category belongs all such work as is either of a simple mechanical kind or consists in the application of well-defined regulations, decisions, and practice, to particular cases, to the other category, the work which is concerned with the formation of policy, with the revision of existing practice or current regulations and decisions, and with the organization and direction of the business of Government. Acting upon this principle Civil Servants are now graded in four classes: (i) a Writing Assistant Class for simple mechanical work, (ii) a Clerical Class for the higher sort of work included in the first main category defined above, and, for the work included in the second category, (iii) an Executive Class, and (iv) an Administrative Class. Writing Assistants are employed in large numbers only in those departments in which there are large blocks of simple routine work to be performed, as in the Post Office, the Health, Labour, and Pensions Ministries. In offices where there are no such large blocks of work of this kind, the duties of the Writing Assistant Class are assigned to the Clerical Class in the initial stage of their career. Writing Assistants are recruited, largely among girls, by local

¹ *Report of the Joint Committee on the Organization, &c., of the Civil Service*, Stationery Office, 1932

competitive examinations of a simple character with age limits of 16 to 17. The pay of this class ranges from 18s to 36s a week exclusive of war bonus¹. Regular machinery exists for the promotion of Writing Assistants of proved capacity to the Clerical grade.

The Clerical Class supervises the work of the Writing Assistants and deals with the collection of statistical and other materials for the higher grades and with the checking of claims, returns, &c., under well-defined instructions. This class is recruited under age limits of 16 to 17 for boys and 16½ to 17½ for girls by open examination based upon the standard of the intermediate stage of a Secondary School course. Entrants are subjected to one year's strict probation. The pay of this class ordinarily ranges from £60 to £250 a year, but with further possibility of rising to £400 a year in cases of proved capacity.

The Executive Class is recruited partly from the Clerical Class, and partly by open competitive examination based upon the standard reached at the end of a Secondary School course. The pay ranges from £100 to £500 a year.

The Administrative Class is concerned with the formation of policy and with the general administration and control of the Departments of the Public Service. Apart from promotion from the lower grades of the Service it is recruited by examination based on a high honours standard at a university, with age limits of 22 to 24. Entrants serve an apprenticeship in a 'Cadet Corps', with salaries ranging from £200 to £500 a year, and thence pass to the

¹ The present bonus scheme was framed in 1920 when the cost of living figure stood at about 130 per cent above pre-war, and this was taken as the basic figure from which bonus calculations begin. For every five full points variation in the cost of living figure above or below 130 the bonus is increased or decreased by 1½%. The cost of living figure on which bonus is at present (1925) based is 80, and the bonus has therefore been reduced by 10/36 from the 130 point. Thus at present, salaries up to 35s a week carry a bonus of 80 per cent, while on salaries above 35s a week the percentage of bonus to salary becomes progressively less than the percentage increase in the cost of living over pre-war, until at £2,000 a year the bonus disappears completely.

highest administrative posts with salaries ranging for permanent Heads of Departments up to £3,000 a year¹

It should be added that a probationary period of one year (which may be extended to two years at the discretion of the Head of the Department) has been prescribed by Order-in-Council for all persons recruited to the Civil Service by examination

Besides the above classes there are employed in the public offices a certain number of professional, scientific, and technical advisers, such as lawyers, physicians, economists, &c., some of whom enter the Service at a relatively mature age by nomination, though as a rule recruitment is by some form of open competition. There is also a large number of typists and shorthand typists who are recruited by examination, within age limits of 18 to 28, and receive from 22s. up to 46s. a week, with superintendents at £150 to £180 a year, and chief superintendents with a minimum of £200 a year. There are also, duly enumerated in the Parliamentary Estimates, chairwomen and messengers.

Entrance to the Service is now almost invariably by open competition and in all but relatively few cases by examination. Under modern conditions it could not be otherwise, since the weaknesses incidental to any form of patronage or selection have, it is obvious, been immensely exaggerated by the multiplication of Government Departments, and the consequent increase in the number of officials. Tendencies in these directions were manifest before the outbreak of the Great War, and were to be attributed on the one hand to a declining faith in the philosophic dogma of *laissez-faire*, on the other to the complementary demand that the State should undertake a variety of functions which, if performed at all, had hitherto been undertaken by individuals or voluntary associations.

Growth
of Bu-
reaucracy

Nothing, perhaps, illustrates more vividly the growth

Public
Social
Services

¹ A very few special posts, created for specially imported men, carry the same and in one case even higher salary

of the social activities of the State than a return which for some years past has been annually presented to Parliament showing the expenditure under certain Acts of Parliament for Public Social Services. The return includes expenditure on the National Insurance (Health) Acts, the Unemployment Insurance Acts, the Old Age Pensions Acts, the Education Acts, and others of considerable though less importance. The total expenditure on such things in England, Wales, and Scotland was in the year 1891 about £13,300,000, in 1901 it had risen to £23,000,000, and in 1911 to about £46,000,000. Neither the Health nor the Unemployment Insurance Acts had in 1911 come into operation, and no account has been taken in the above figures of sums expended on the relief of the poor. To the growth of expenditure on such services since 1911, and particularly since the War, reference will be made in another connexion. The number of persons employed in the Public Service tells a similar tale. In 1797 it was 16,267, by 1827 it had increased to nearly 23,000,¹ in 1914 it was 279,300.² It is now (1925) 299,120, and has in the interval been much higher.³

Civil
Service
Estimates

Equally eloquent is the growth in the Civil Service estimates. No estimates were presented to Parliament for the salaries of the Civil Service until 1848. Down to the end of the eighteenth century the cost of civil government, so far as it was not self-supporting, was paid out of the Civil List of the Sovereign, as was proper and logical so long as the staffs of the Departments of State were regarded as household servants of the King. The office premises were technically regarded as 'lodgings out of court', and the staffs were, to a relatively recent date, entitled to food from the King's kitchen supplied at the King's expense. Thus there is a record as late as 1737 of

¹ Public Offices Employment Returns, 1828

² Cmd 2428 (1925)

³ Cmd 2448 (1925). These figures no longer include (as did those of 1914) southern Ireland, nor do they include industrial staffs, Admiralty staffs in foreign yards, or some 6,000 employees of the War Office, Air Ministry, and Labour Ministry.

a payment of £1,269 to two Under-Secretaries and sixteen of their clerks as 'Board wages during His Majesty's residence at Hampton Court, July 14-October 29'—a clear indication that while the Court was in London these gentlemen were fed from the royal kitchen. The remuneration of these 'Civil' servants was mainly derived from fees. The Secretary to the Post Office, for example, had a salary of £1,200 a year, and in addition derived over £3,000 a year from fees. Even the Heads of Departments were to a great extent remunerated in a similar way. The fees of the Foreign Secretary were reckoned at £2,000 a year, of the Lord President £2,280, while the fees of the Home Secretary were so large that it was his practice to return £1,500 a year out of them to increase the emoluments of the clerks in his office.¹

The drastic reform applied to the Legislature in 1832 was quickly followed by equally drastic changes on the administrative side of Government. So long as the King was the personal and effective ruler of the realm it was natural that the administrative officials should be regarded as his personal servants, appointed to do his will, and remunerated in part out of his purse, and in larger part out of the fees of suitors and clients. Patronage and nomination are the logical complements of autocracy and even of oligarchy. When supreme power passed to a reformed House of Commons it was natural that the servants of the King should become the servants of the State. The change of system, like most other changes in this country, was effected by gradual stages. An indication of the coming change may be found in a comparison of the Accounts of Public Income and Expenditure for the year ended 5 January 1802, with the accounts for the years immediately preceding. In the year 1802 the Civil List payments are for the first time set forth under the eight classes into which the Civil List expenditure had been specifically

Parliamentary
control

¹ Gretton, *The King's Government*, pp. 97, 108, *Report of Select Committee on Reduction of Salaries* (1831), S. C. on Misc. Expenditure,

divided by Lord Rockingham's Act of 1782¹ More than that, there now appears for the first time an item, *Miscellaneous Civil Services out of Supplies*, viz

	£	s	d
Class 1 Public Works and Buildings	37,121	0	0
„ 2 Salaries, &c, of Public Departments	42,740	14	0
„ 3 Law and Justice	32,439	12	3
„ 4 Education, Science, and Art	—	—	—
„ 5 Colonial Consular and other Foreign Services	165,680	14	9
„ 6 Superannuations, Charities, &c	273,262	0	8
„ 7 Miscellaneous, special and temporary	178,611	2	0

The total sum thus granted 'out of supplies' (1802) amounted to £729,855 3s 8d, as compared with a total of £997,678 3s for the Civil List 'Supply', it must be observed, accounted only for the supplementary payments for the carrying on of the Civil administration of the State. The bulk of the charge was still imposed upon the Civil List and was not, therefore, subject to the annual scrutiny of the House of Commons. That any portion of the charge for the Civil Service should be contingent upon an annual vote and consequently subject to an annual scrutiny marked an immense step forward towards the control of Parliament over public expenditure.

The annual charge tended to increase, though not quite constantly. In 1804 it was just over £1,000,000, in 1815 just short of £2,000,000, in 1819 £2,500,000. For the latter year the Civil List charge amounted to £1,319,404 2s 2d. All through the reigns of George III and George IV there had been constant deficits on the Civil List, due in part to the inevitable growth of public expenditure, in part to the efforts of the Crown to retain its political influence in the manner cynically commended

¹ 22 Geo. III, c. 82

by Sir Robert Walpole. These deficits Parliament had to make good. On the accession of William IV a more decisive step was taken. Upon the recommendation of a select Committee all expenditure 'not directly' affecting the dignity and state of the Crown and the personal comfort of their Majesties was removed from the Civil List, which was then fixed at £510,000. Meanwhile the payments for Miscellaneous Civil Services out of supply grants had mounted (for the year ending 5 January 1832) to £2,850,000. On the accession of Queen Victoria the Civil List was reduced to £385,000, and at the same time relieved of the payment for Civil List pensions. The Supply Grants showed thereafter a tendency to rise: they amounted to nearly £2,800,000 for 1838, nearly £3,000,000 for 1842, and over £5,000,000 for 1847.

The growth of expenditure for Miscellaneous Services led to the appointment, in February 1848, of a Select Committee to inquire into this branch of national expenditure and to report on the possibility of reductions or of improvements in the mode of submitting estimates to Parliament. The average expenditure for these services in the decennial period 1798-1807 had been £1,800,012, in that from 1828 to 1837, £2,269,668, and in that from 1838 to 1847, £3,016,343.

Select
Committee
of
1848

The Committee expressed their conviction that the 'only large reduction that could be made would be that Parliament should decide on some great measure of relief to the Public purse from certain charges, and afterwards urge upon the Executive a minute and constant supervision of those that remain.' Sir F. T. Baring, M.P., expressed to the Committee his opinion that 'the Treasury ought to be constantly employed in revising this expenditure.' 'These revisions', he said, 'have been periodical, in my opinion they ought to be continuous.'¹

How far those revisions were effective in reducing expenditure, or in preventing the growth of it, may be seen from the expenditure on Civil Government (with which

Growth
of Civil
Service
Expendi-
ture

¹ *Report*, vol. xviii, Sess. 1847-8.

alone we are at present concerned) during the next twenty years

	£
1848	12,207,973
1849	11,466,615
1850	11,150,603
1851	11,001,648
1852	10,952,035
1853	10,688,889
1854	11,417,812
1855	11,026,520
1856	13,212,723 ¹
1857	13,091,138
1858	14,505,906
1859	13,626,098
1860	14,124,461
1861	15,215,476 ²
1862	15,521,537
1863	15,434,973
1864	15,298,923
1865	14,811,883
1866	14,853,002
1867	15,346,976
1868	16,076,961

These figures include the Consolidated Fund charges (except that for the Service of the Debt), the Civil Administration, and the Revenue Departments. They reveal an almost constant, though not a startling, increase of civil expenditure, and even more clearly they reveal the influence exercised upon English politics during the whole of this period by the Manchester School. In some directions that influence may have been far from beneficent, in regard to public expenditure it was in the highest degree salutary. Economy was the watchword of the school, and, in particular, of Mr Gladstone, who as Chancellor of the

¹ The effect of the Crimean War is apparent in this and the following years

² Post Office Packet Service transferred from Navy to Post Office in this year

Exchequer, 1852-4, 1859-66, and 1880-2, did more than any statesman of his time to exorcize the spirit of public extravagance

That economy lay at the root of all sound administration was indeed the central article in Gladstone's creed. To him the principle of thrift, public and private, was not merely economic but ethical, and he never tired of preaching, and, while he had the power, of enforcing it. 'All excess in the public expenditure beyond the legitimate wants of the country is not only a pecuniary waste, but a great political and above all a great moral evil'.¹ 'Economy', he wrote to his brother Robertson, 'is the first and great article in my financial creed'. And economy must have regard to pennies not less than to pounds. Addressing an Edinburgh audience in 1879 he said 'The Chancellor of the Exchequer should boldly uphold economy in detail, and it is the mark of a chicken-hearted chancellor when he shrinks from upholding economy in detail. He is ridiculed no doubt for what is called candle-ends and cheese-parings, but he is not worth his salt if he is not ready to save what are meant by candle-ends and cheese-parings in the cause of the country'.²

Gladstone's
Influence
at the
Treasury

Mr Gladstone's practice was consistent with his precepts. The last Budget for which, as Chancellor of the Exchequer, he was responsible (his thirteenth) was that of 1882. In that year the estimated total expenditure amounted to £85,429,491, the Civil Service expenditure to £16,872,729—a sum hardly in excess of that under Mr Gladstone's first Ministry of 1868.

To a post-war generation these figures appear almost insignificant, and in the figures for the next twenty years there was little to alarm even the more rigid economists, though it is possible to discern the effect of social legislation upon public expenditure. In 1887-8 the Civil Service expenditure was £18,210,000,³ and after a decline in the

Expendi-
ture
1882-
1914

¹ Morley, *Life*, II, 53.

² *Ibid.*, 62-3.

³ These and the following figures include only what is now strictly regarded as Civil Service and excludes Consolidated Fund charges and Revenue Departments—unlike the figures on p. 134.

next four years, gradually mounted again to £20,884,000 in 1896-7, and to £36,200,000 under the influence of the South African War in 1902-3. Not until 1909-10 did it again reach that figure, but Mr Lloyd George's first Budget of that year provided for £40,010,000. Within five years the same Chancellor of the Exchequer had increased expenditure, under this head, to £57,066,000,—his original estimate for the last pre-war year 1914-15.

How was this money expended? By far the largest single item until we reach the Great War, with its heavy charge for war pensions, was for education. In the year 1890-1 the charge to the exchequer, apart from local rates, was about £6½ millions, in 1900-1 it had risen to nearly £13 millions, in 1910-11 to £19 millions, and in 1921 to nearly £56 millions. By 1910-11 another considerable item had appeared—over £7½ millions for old-age pensions. This item increased rapidly to £20½ millions in 1921, and for the year 1925-6 to nearly £27 millions. The Ministries of Health and Labour, neither in existence in 1891 nor indeed in 1911, now claim between them, largely for health and unemployment insurance, no less than £35 millions.

Figures such as these point, more graphically than many words, to the immense expansion of the activities of the Civil Service during the last forty years, and more particularly in the last fifteen.

The War
and the
Civil
Service

The period since the outbreak of the Great War must evidently be treated as exceptional, and many of the phenomena connected with that period may, it is hoped, be regarded as transitory. The State was suddenly called upon to assume—apart from the actual provision of men and munitions for the conduct of the war—a multitude of functions, to which it was unaccustomed, and for which the available machinery was neither apt nor adequate. This expansion of activities is clearly demonstrated by the rapid increase of Civil Service expenditure, by the phenomenal addition to staffs, and by the creation of new Ministries and Departments.

For the last pre-war year (1914-15) the Civil Service expenditure was estimated, as we have seen, at £57,066,000. The audited expenditure for that year was £130,837,590, for 1915-16, £728,555,621, for 1916-17, £1,270,197,820, and for 1917-18, £1,686,613,670. The last figure marked the peak of expenditure, and it may be interesting to record some of the largest items in this colossal total. The Ministry of Munitions accounted for £715,101,222 (the highest point reached for munitions), loans to Dominions and Allies for £488,344,866, and the Ministry of Shipping for £194,771,284.¹

Civil Service Expenditure

After the war there was naturally a rapid reduction to £448,816,000 (audited expenditure) in 1920-1, and to £222,609,000 for 1925-6 (original estimates), but even the latter figure shows an increase of £165,543,000, or over 300 per cent, as compared with the estimate for the last pre-war year. From this comparison war pensions, amounting for the current year² to £66,026,000, must clearly be omitted. Education, however, shows an increase of over £30 millions (from £17 to £47 millions), Old-age Pensions of £16,683,000 (from £10,000 to nearly £27 millions), Health and Unemployment Insurance of £13½ millions (from £6½ to £20 millions), while other large items are £2½ millions for the Board of Agriculture (against £371,000), £3½ millions for a variety of Health Services (against £522,000), £6½ millions for Works and Buildings (against £3½), £9,040,000 for Housing (an entirely new item), over £7 millions for Police Grants (also new), and over £5 millions for Mandated Territories and Middle Eastern Services.

Criticism of the policy which has involved, and may or may not justify, the expenditure detailed in the preceding paragraphs would be out of place in the present work. The figures are quoted simply for the purpose of illustrating the effect of the Great War, and of the new sense of

Departmental Staffs

¹ Cmd 802 (1920)

² 1925-6 (estimate). In 1920-1 the charge for war pensions was no less than £100,367,000. Cmd 2428 (1925)

money values induced by war-expenditure, upon domestic administration. Such figures do not, however, stand alone. Parallel with them, and not less illuminating as evidence of the vast extension of State activity, was the expansion of the staffs of Government Departments. In 1914 the total staff, as we have seen, was 279,300, of whom the Post Office accounted for 208,900. At the time of the Armistice (11 November 1918) the total was 418,025. A six-fold increase in the War Office staff (excluding Record Office and Pay Office and Ordnance Factory staffs) is intelligible, as is the increase in the Admiralty between three and four-fold. But, save for the Post Office, by far the largest staff at the time of the Armistice was that of the Surplus Stores Liquidation Department—hitherto the Ministry of Munitions. This was responsible for no fewer than 65,142 persons. But the Board of Trade had expanded from 2,500 employees to 7,036, apart from its subordinate Departments for Food Control and Shipping Liquidation which in November 1918 were jointly responsible for nearly 12,000 employees.

The
Bradbury
Commit-
tee, 1918

The rapid growth of 'Whitehall' created a considerable measure of alarm in the public mind. The impression began, rightly or wrongly, to prevail that the expansion of Government employment was, during the war, on an exaggerated, unnecessary, and extravagant scale. To appease public uneasiness a Treasury Committee under Sir John (now Lord) Bradbury was (February 1917) appointed to inquire into the numbers and organization of the clerical staffs employed in the new Ministries created, and in other Departments enlarged, during the war, the method of recruitment and rates of remuneration, and to report on possible improvements and economies. The final Report of this Committee was presented in 1919 and showed that the clerical, &c., staffs employed in Civil offices (i.e. excluding the entire staffs of the Army local establishments, of the Ordnance Factories, and of the Ordnance Survey Department, the manipulative staffs of the Post Office and the men in other departments who

were absent on military service) amounted, on the dates mentioned, to

	<i>Men</i>	<i>Women</i>	<i>Total</i>
1 August 1914	45,000	8,500	53,500
1 April 1917	54,000	51,000	105,000
1 February 1918	62,000	86,000	148,000

The Committee formed the opinion that this enormous expansion was due primarily to the inevitable extension of Government activities during the war, but that the numbers employed were excessive as compared with the numbers which would have been required if the standard of organization prevailing in the best-managed permanent departments could have been adopted throughout the service. Under the stress of war such an ideal was evidently unattainable. New departments had to be hurriedly created, their staffs had to be collected at short notice, it was impossible to insist on any strict test of qualification, such non-commissioned officers (if we adapt the analogy) as were not released for military duties were too few in number to train the new recruits. There was, moreover, great difficulty in securing suitable office-accommodation, the sub-division of departments between a number of widely scattered buildings led to waste of staffs, duplication of functions, and rendered more difficult the task of training and of supervision. Nevertheless, after making all allowances for these and similar difficulties the Bradbury Committee came to the conclusion that there remained a proportion, and 'in some departments a very substantial proportion of staff which was excessive and whose employment could have been avoided by better organization'. The excess was due, in their opinion, in some degree to overlapping between departments, but much more to defects in internal organization, particularly in the new departments.

Not content with criticism the Bradbury Committee made a series of detailed recommendations as to staffing, the concentration of office accommodation, the strengthening-

ing of Treasury control and like matters, a consideration of which is beyond the scope of this chapter. The general purport of the recommendations was that there should be a return to normality in Civil Service administration at the earliest possible moment permitted by circumstances.

The
return to
normality

Circumstances proved, as a fact, unexpectedly obdurate, and the return to normality was correspondingly slow. By 1 April 1922 the staffs showed a reduction of about 25 per cent as compared with Armistice Day (317,721 as against 418,025), and the Civil Service expenditure for the year 1922-3 amounted to £290,600,000, as compared with £932,383,203 for the first year of peace, 1919-20. Gone was the bread subsidy which in 1919-20 had cost £56,500,000, gone was the item 'Loans to Dominions and Allies' which in the earlier year had accounted for no less than £147,500,000, the payment under the Railway agreements was halved and was soon to be reduced to insignificance, while war pensions already showed a diminution of £26,000,000 as compared with the 'peak' year¹. But these were not the items which caused most anxiety to those who looked for drastic economies and a contraction of the activities of the State. These items evidently represented the lingering legacy of war-time administration. It was the increased expenditure on peace-time activities which in particular inspired alarm.

New departments had, as will presently be seen, necessarily been called into being by the war. Some had already closed down, others had been reduced to skeleton proportions and were soon to die the death of the unrighteous, others again, like the Ministry of Pensions, were bound to tarry for a considerable time, some, like the Ministries of Labour and Transport, seemed destined to permanence. But this aspect of the development of the Civil Service will be treated more appropriately in the next chapter.

¹ Cmd 802 (1920), 4428 (1925)

XXVIII THE PERMANENT EXECUTIVE (2)

The Great Offices of State The Secretariat

'Amongst all particular offices and places of charge in this State there is none of more necessary use, nor subject to more cumber and variability, than is the office of principal Secretary'—NICHOLAS FAUNT (1592)

'All officers and counsellors of provinces have a prescribed authority by patent, by custom or by oath, the Secretary only excepted, but to the Secretary, out of a confidence and singular affection, there is a liberty to negotiate at discretion at home and abroad, with friends and enemies, in all matters of speech and intelligence'—SIR ROBERT CECIL

'It is not the business of a Cabinet Minister to work his department. His business is to see that it is properly worked'—SIR GLOUCEL CORNEWALL LEWIS

REFERENCE has been repeatedly made in the course of this work to the haphazard development of English institutions. The observation is not least pertinent in regard to the administrative system. The English Constitution has never been 'made', it is organic, it has developed with the development of the people, and strengthened with their strength. The hand of the reformer has been frequently applied to it, or rather the process of amendment—a patch added here, a rent mended there—has been wellnigh continuous. What is true of the Constitution as a whole is true also of those departments of Government which are concerned with the work of practical administration. 'The English offices', says Bagehot, 'have never since they were made, been arranged with any reference to one another, or rather, they were never made, but grown as each could'. Of the administrative system, in its totality, Bagehot's observation is undeniably true, but in regard to particular offices it is less true to-day than it was when Bagehot wrote some sixty years ago. Not indeed until the appointment of the Machinery of Government Committee by the short-lived Ministry of Reconstruction

Growth
of the ad-
ministrative
System

(1917) was there any attempt officially to survey the administrative system as a whole or to suggest a scheme for its reorganization on lines at once more scientific, more practically efficient, and (it was hoped) more economical. To the Report of this Committee, over which Viscount Haldane of Cloan presided, further reference will be made later.

The tedious detail of the preceding chapter will at least have served to illustrate the obvious truth that administration is largely a matter of money. In primitive communities indeed the Sovereign calls upon his subjects not for money but for service. The substitution of a money economy for a personal economy is one of the earlier manifestations of an emergence from primitive conditions of society to those which we are pleased to term 'civilized'. The latter term is itself, indeed, indicative of the transition. The institution of *Scutage* in England, in the twelfth century, marked an important stage in the evolution of modern society. The King found it more convenient even for the purposes of waging war, especially if the campaign was on foreign soil, to accept from his vassals a composition in money in lieu of personal service. The demand thus made for money produced widespread reactions. Feudal lords and then manorial villeins found it to their mutual advantage to substitute fixed money payments for the agricultural services owed by the villeins to the lords.

The Treasury It is not, therefore, remarkable that the history of the Administrative System, or rather the history of the differentiation of Government Departments, should begin with the Treasury, the *Scaccarium* or Exchequer of the Norman and Angevin Kings.

The Exchequer is descended from the *Curia Regis*, or, to speak more precisely, the Norman *Scaccarium* was the *Curia* when sitting for financial business. It consisted of two offices: the Upper, which was a Court of Account, and the Lower, a Court of Receipt. The function of the Exchequer of Account was to ascertain what was due to the King, of the Exchequer of Receipt to receive it. The

Exchequer of Account gradually developed into one of the three great Courts of Common Law, the Exchequer of Receipt was, if not the ancestor, at least the predecessor, of the modern Treasury¹ The Upper Exchequer consisted of the Chancellor, the Treasurer, and a board of high officials known as the Barons of the Exchequer This Court controlled all persons who collected or expended the revenues of the Crown, audited accounts, and determined all legal questions relating to revenue The full body met only twice a year to receive the sheriffs' accounts, and in the intervals between its sessions the Barons of the Exchequer went on circuit throughout the country for the transaction of financial and judicial business

The chief officers of the Exchequer of Receipt were the Treasurer and the Chamberlain The functions of the latter officer were later subdivided between the Lord Great Chamberlain, the King's Chamberlain, and the Chamberlain of the Exchequer Down to 1826 payments into the Exchequer were recorded by means of tallies, one-half of which served as a receipt to the payer, the other as a record of payment for the Exchequer Payments out of the Exchequer were authorized by an order under the Great or Privy Seal addressed to the Treasurer and Chamberlains The association of these officials emphasizes the confusion, to which attention has already been drawn, between the household and national accounts and the household and State officials

The growth of business, the centralization of administrative functions, and the legal reforms of Henry II led, before the end of the twelfth century, to a differentiation in the functions of the Exchequer and a bifurcation of staffs A Chief Baron, with three or four other Barons, dealt with judicial business the Treasurer and his clerks did the administrative work Yet traces of the common origin of the Courts of Law and the Treasury may be found in the fact that down to the year 1875 the Chancellor of the Exchequer was entitled to sit as a judge in the

¹ Cf. Gretton, *op cit.*, p. 1 seq.

Court of Exchequer, and on the morrow of St Martin (12 November) he still annually sits in the High Court of Justice for the purpose of appointing the sheriffs. To this ceremony the whole Cabinet as well as the Judges are summoned. Thus 'the Justiciarii and great officers of State sit once more on the Exchequer side of the *Curia*, only the Exchequer and its barons have gone and the Chancellor of the Exchequer finds himself presiding in the Queen's Bench Division of the High Court of Justice'.¹

Among the great departments of State the Treasury still stands in every sense apart, and in some sense pre-eminent as it has stood for over seven hundred years. As early as 1155 the Pipe Roll makes mention of a payment 'for repairing the house of the Exchequer', from which we may infer that as far back as the reign of Henry II the Treasury was separately housed, though the 'house' was then, and for long afterwards, within the precincts of the Royal Palace of Westminster. Owing perhaps to the fact that the Treasurer had his own office the Exchequer became the place of deposit for State archives. The responsibility for the custody of these documents from the time that they are released from the departments to which they severally belong is now vested in a great judicial officer, the Master of the Rolls.

The Treasurer was, from the Norman Conquest until the Tudors, one of the great officers of the King's Court and of the State. He was originally inferior in dignity to the Justiciar, who acted as the first Minister of the King, and, during the latter's frequent absences from the realm of the King, as Viceroy. The Treasurer was inferior also to the chief clerk, or Chancellor, who after the abeyance of the Justiciarship (temp Henry III) was in dignity as well as in power and influence second to the King. Yet the author of the *Dialogus de Scaccario* (temp Henry II) says of the Treasurer that he could hardly explain in words the cares and anxieties of his office, though he had the pen of a ready writer. His solicitous diligence was

¹ Anson, *The Crown*, p. 178

necessary in all the transactions of both the Upper and Lower Exchequers, so much so that so long as the Exchequer remained, his duties could not be separated from it. He received the accounts of the sheriffs, and had the charge of writing the Great Roll, being responsible that there was no error in number, cause, or person, and that no one should be discharged who was not quit, and no one charged who had acquitted himself.¹ 'In a word,' as Madox puts it, 'his duty was to provide for and take care of the King's profit.'

By the separation of the Chancery from the Exchequer, at the end of the reign of Richard I, the Treasurer gained greatly in dignity and independence. Still more so by the disappearance of the Justiciar. Moreover, the appointment, under Edward I, of a Chief Baron of the Exchequer relieved the Treasurer of judicial business and left him free to devote himself to his administrative and political duties. From this time onward he was second only in the official hierarchy to the Chancellor until a rival appeared, under the Tudors, in the person of the King's Secretary, or until both were surpassed if not superseded by the emergence of a Prime Minister.

Meanwhile, the separation of the Chancery from the Exchequer necessitated the appointment of a new official to take charge of the Seal (*cancellarium*) of the Exchequer, and perhaps also to keep a check upon the Treasurer, who was already tending to become over-powerful and independent. The earliest record of the appointment of a Chancellor of the Exchequer is the 18 Henry III.² 'He was bound equally with the Treasurer to see to the correctness of the Great Roll,' and if the Treasurer was in error he was 'to rebuke him with modesty and to suggest what ought to be done. If the Treasurer persevered, the matter was to be argued before the Barons and left to their decision.'³

The
Chancel-
lor of the
Ex-
chequer

¹ *Public Income and Expenditure* (1869), p. 135, *Dial de Senec*, p. 13, Madox, p. 55.

² Though in 1217 Robert Pesslaw is recorded as being 'Chancellor of the Exchequer or deputy treasurer under Peter de Ortel.'

³ Report of 1869 quoting Madox and *Dial de Senec*.

A long time was, however, to elapse before the position of the junior official in any way rivalled that of the senior. From the time of Henry VII the functions of the Chancellor of the Exchequer would seem to have become steadily more important. The office of Chancellor of the Exchequer and Under-Treasurer have since then generally been held by the same person, though under different patents. But under Henry VIII Thomas Cromwell combined for a time the office of Chancellor of the Exchequer with that of Lord Treasurer. In 1622 a Commission was issued to enable the Lord Treasurer to act as Chancellor of the Exchequer, and in 1624 Sir Richard Weston combined the latter office with that of Under-Treasurer, besides being a Commissioner to execute the office, during a vacancy, of Lord Treasurer. The growing importance of the Chancellorship of the Exchequer is indicated by the fact that under Charles I the office is held by such men as Francis (afterwards Lord) Cottington, by Sir John Colepeper, and, in 1642, by no less a man than Sir Edward Hyde, afterwards Earl of Clarendon. From the reign of Charles II the Treasurership was, with increasing frequency, put into commission, with the result that the Chancellorship of the Exchequer still further developed in importance.

After the Revolution of 1688 we get nearer and nearer to the modern practice. Thus in 1694 Sidney (afterwards Earl of Godolphin) became Chancellor of the Exchequer and first Commissioner of the Treasury. Sir Robert Walpole is similarly designated in 1715, and finally in 1717 James (afterwards Earl) Stanhope became Chancellor of the Exchequer and first Lord Commissioner. This was the position and style assigned to Walpole in 1721. By that time, however, the Prime Minister had definitely emerged, the Treasurership had been finally put into commission, and the Chancellor of the Exchequer, having got rid of the incubus of a personal Lord High Treasurer, had come to occupy one of the most important places under the Crown, though in the official hierarchy his place

is inferior to many of his Cabinet colleagues. The last personal holder of the office of Lord Treasurer was Charles, Duke of Shrewsbury, who was appointed to the office, which he held with those of Lord-Lieutenant of Ireland and Lord Chamberlain of the Household, in the last hours of the reign of Queen Anne. In 1714 George I nominated Lord Halifax and four other persons to be Lords Commissioners for executing the office of Lord High Treasurer, and in Commission the office has remained ever since that time. The duties are nominally apportioned among five persons: the First Lord, who has generally, though not invariably, combined this office with the Premiership, three Junior Lords, who now act as the Party Whips, but have no duties,¹ save purely formal ones, at the Treasury, and the Chancellor of the Exchequer, who is now the working Head of the Department. The 'Board' was still a reality down to the close of the eighteenth century, but like other Boards (e.g. the Board of Trade), though regularly constituted, has long since ceased to meet.

The Treasury is still in many respects the most important Department of the Central Government, since it exercises or ought to exercise a strict control over the most Subject, of course, to Parliament, the Treasury is responsible for the regulation of taxation and for the collection of revenue, being assisted in the latter function by the Revenue Departments. It also controls expenditure. Consequently all estimates must be passed by the Treasury before they are submitted to the House of Commons by the Minister immediately responsible. Under the Cabinet system, however, the responsibility for expenditure, as for everything else, is collective, and, should the Cabinet decide that a certain expense must be incurred, the Treasury has no option but to find the money. The Chancellor of the Exchequer, if he deems the expenditure unjustifiable, has one means of protest, but one only—that of resignation. In 1887 Lord Randolph Churchill

¹ They occasionally 'represent' a Department, otherwise unrepresented in the House of Commons.

resolved on this method of protesting against the expenditure on armaments, the Prime Minister decided in favour of the Admiralty and the War Office, and Lord Randolph Churchill's resignation was consequently accepted. But the protests of the guardian of the national purse do not often go so far as this. The threat is frequently uttered but rarely carried out. Lord Palmerston declared that his desk was full of Mr Gladstone's resignations, but, in his case, matters were always in the long run adjusted. On one occasion when the tone of the Chancellor of the Exchequer was more than ordinarily menacing, Lord Palmerston wrote to Queen Victoria 'Viscount Palmerston hopes to be able to overcome his [Mr Gladstone's] objections, but if that should prove impossible, however great the loss to the Government by the retirement of Mr Gladstone, it would be better to lose Mr Gladstone than to run the risk of losing Portsmouth or Plymouth'. Both the threatened disasters were for the time being averted, but the story illustrates vividly enough the relations which may subsist between a Chancellor of the Exchequer and his colleagues of the Cabinet. Mr Gladstone was perhaps mindful of his own earlier experience, when at a later stage of his career he elected to combine the offices of First Lord of the Treasury, Prime Minister, and Chancellor of the Exchequer. In view of the control which the Treasury ought to exercise over the 'spending Departments', and the intimate knowledge which its Chief ought to possess of their requirements, there is much to be said for this arrangement. But with the rapid expansion and growing complexity of the nation's business the experiment is one which is hardly likely to be repeated.

Besides its general control both over Revenue and Expenditure, the Treasury has to arrange for the provision of the funds required to meet the day-to-day necessities of the public service, and for this purpose it is entrusted with extensive borrowing powers. To the Treasury it falls also to initiate and carry out all measures affecting the

currency and the public debt. Finally, it prescribes the form in which the public accounts shall be kept.

It has other functions of minor though not small importance, such as the audit of the Civil List of the Sovereign, the award of Civil Pensions, the financial control of the County Courts, the valuation of Government property for rating purposes, and the general regulation of the personnel of the Civil Service in such matters as recruitment of staff, salaries, and wages, hours and conditions of work, leave, and travelling and subsistence allowances.¹

The total staff of the Treasury and the Departments subordinate to it now (1925-6) numbers 780 persons, and the net total of the estimate is £315,807. The subordinate offices are the Cabinet Secretariat and Committee of Imperial Defence,² the Office of Parliamentary Counsel, the Exchequer Office Scotland, the Paymaster-General's Office, the University Grants Committee, the Trade Facilities Act Advisory Committee, and the War Histories Department. The Exchequer and Audit Department is wholly independent of the Treasury, and the head of that Department is independent not merely of the Treasury, but, for reasons already stated, of the House of Commons, his salary being charged, like that of the Judges, on the Consolidated Fund.³

The Revenue Departments—the Customs and Excise, the Inland Revenue and the Post Office—are in theory still farther removed from the Treasury, and the estimates for these departments are not even included in Civil Service Estimates.

The question has indeed been raised whether it can be regarded as a sound principle of administration that the same department should be responsible both for raising the revenue and controlling the expenditure. The answers are not unanimous. Those who favour a large increase in the activities and therefore in the expenditure of the State

Dual
func-
tions of
the
Treasury

¹ Cd 9230 of 1918, p. 17.

² *Supra*, II, p. 83 seq.

³ *Supra*, p. 531, *infra*, Appendices D and E.

chafe at Treasury control. They contend that it is the business of the Chancellor of the Exchequer to raise the funds demanded by the collective wisdom of his colleagues. This view has never yet obtained general acceptance. On the contrary it has been commonly held that it is essential both to efficiency and economy that the Minister responsible for raising the revenue should also have a predominant voice in deciding on the amount, and—in some degree—on the character of the expenditure. Only in this way can the Chancellor of the Exchequer impose an effective restraint upon the demands of his colleagues and appreciate the extent of the liabilities to which he is being committed by them. If he is to be held responsible for filling the reservoir and maintaining a certain depth of water in it, he must also be in a position to regulate the outflow.¹

The
Secretary
of State

The Treasury, however, is not, or should not be, a spending department. Its traditional function is to act as a watchdog, to stand sentinel over the other Departments. To the other Departments we may now pass, and first to those over which His Majesty's Principal Secretaries of State preside. Of these Secretaries there are now six,² but although the powers of the Secretary of State are assigned in practice to six different persons, there is still, in legal form, only one office, and any one of the Secretaries may legally exercise its powers. Acts of Parliament still confer powers on 'a Secretary of State' which by statutory definition means 'one of His Majesty's Principal Secretaries of State'. Thus modern terminology recalls and conforms to the facts of history, since all six Secretaries derive from one official who was originally, like other great officers, attached to the King's person in a domestic not to say a menial capacity. The duties of the King's Secretary were originally discharged by the Chancellor, who had the custody of the Great Seal. But the Chancellor, as we

¹ Cd. 9230, p. 18.

² Increased (1926) to seven by the appointment of a Secretary of State for Scotland.

have seen, tended to become more and more absorbed in judicial duties, the Chancery itself was located at Westminster, and the King found it necessary to have a 'lesser seal in the shape of a Private or Secret Seal' which was entrusted to a 'Keeper' who acted as the King's confidential clerk and was constantly about his person.

Before long the Keeper of the Privy Seal, like the custodian of the Great Seal, developed into an officer of State so important that the Lords Ordainers, when presenting their scheme of reform to Edward III, demanded that they should have the nomination of this Minister. Again, therefore, the King found it necessary to enlist the services of a less exalted official, he provided himself with a third seal, the signet, for his private use and entrusted his private correspondence to a *Secretarius*.¹

This new official, the King's Secretary, is first mentioned in official documents in the reign of Henry III. In the Commission for negotiating an alliance with Spain in 1253 one John Maunsell is described as *Secretarius Noster*, in 1254 he is empowered as 'Secretary' to give assent to the marriage of Prince Edward with Eleanor of Castille, and four years later is mentioned as a member of the King's Council. His successor, Henry de Wingham, was also a member of the Council and was rewarded for his secretarial services by the Bishopric of London—an indication that the Secretaryship was becoming a post of distinction.

There is a marked advance in the importance of the office during the fourteenth century

The
Three
Seals

'The signet was gradually superseding the privy seal as the seal for the King's private use, and the clerk of his chamber who kept the signet was gradually employed more and more exclusively on secretarial business until the title of Secretary was by Richard II's reign officially applied to him. The fifteenth century opens with the signet firmly established as the third and most private of the King's three official seals.

¹ In the revision of this chapter I have had the advantage of Miss F. G. Evans's scholarly monograph, *The Principal Secretary of State* (1925), and Sir F. Truap's valuable little book, *The Home Office* (1925), in addition to Gretton, *op cit*.

It is used both to authorize the issues under the privy seal and chancery, and to seal the personal correspondence of the Sovereign, and its Keeper, a subordinate household officer, is officially known as the King's Secretary ' ¹

The procedure in reference to the Seals is thus described by one who was for many years intimately associated with the work of the Home Office ² ' While in the eleventh century the King gave verbally to the Chancellor the instructions on which he issued an instrument under the Great Seal and while in the thirteenth century the King gave his verbal instructions to the Keeper of the Privy Seal who conveyed these instructions under the Privy Seal to the Chancellor who thereupon issued the instrument under the Great Seal in the fifteenth century the King expressed his wishes to his Secretary who communicated them under the signet or the sign manual to the Keeper of the Privy Seal who passed them on under the Privy Seal to the Chancellor who thereupon issued the instrument under the Great Seal This last cumbious procedure,' adds Sir Edward Troup, ' a fossilized record of the rise of the several offices, has survived almost to the present day ' The letters patent for the creation of a peer are still sealed with the Great Seal on the authority of a royal warrant countersigned by a Secretary of State The intermediate stage involving the intervention of the Privy Seal was cut out only by the Great Seal Act of 1884 The possession of the signet is still the formal evidence of the authority of the Secretary of State, who on his appointment receives from the Sovereign three seals the signet, a lesser seal, and the *Cachet* The custody of the signet was indeed ' the primary duty of the King's Secretary long before he became head of a department ', ³ though it was not until the reign of Richard II that political significance attached to the use of the signet The Secretary was not, however, at that time regarded as at all on the same level as the

¹ Evans, *op cit*, p 14

² Sir Edward Troup, K C B, K C V O, Permanent Under Secretary of State in the Home Office, 1908-22

³ Anson, II 168

Chancellor, the Treasurer, or the Privy Seal—those being the officials over whose appointment the opponents of the Crown wished to secure control¹

The fifteenth century was, as already indicated, essentially a period of constitutional definition. Holding the Crown by a parliamentary title the House of Lancaster was constrained to accept the principle of parliamentary control over the Executive. It is not, therefore, surprising that during this period the King's Secretary should begin to emerge from his original position as a household officer — 'the beloved clerk who stays continually by our side' — into that of a Minister of State. But the evolution was slow. When the Lancastrians came to the throne the King's Secretary was still not much more than a steward or domestic bursar keeping minute accounts of receipts and expenditure in the royal household, and taking rank with the King's Surgeon and the Clerk of the Kitchen.

The Fifteenth Century

In the year 1443 certain rules were made by an Order-in-Council to ensure the responsibility of the Council and the officers of the King for the answers given or grants made in response to petitions. This ordinance incidentally throws light upon the functions and status of the Secretary. If the answer involved a grant the Secretary was required to prepare letters which, signed with the signet, should authorize the fixing of the Privy Seal and ultimately the Great Seal. Here, as Sir William Anson observes, we find the Secretary in a position of recognized responsibility for the expression of the King's will.² The enhanced status of the King's Secretary is clearly indicated by the inclusion of Gervase le Voloie with such eminent personages as the Duke of Somerset and Alice de la Pole, Duchess of Suffolk, in the list of those who in 1451 were impeached by the Commons in a petition to the King for 'misbehaving about youi ioiall persone, by whos undue means your possessions have been gretely amencused, your laws not executed, and the peas of this your Reame not observed

Ordinance of 1443

¹ Grotton, p. 27

² *Op cit* ii 162

nother kept ' ¹ Thomas Mannyng, another of Henry VI's Secretaries, was among the other adherents of the Lancastrian House who were attainted of high treason after the accession of Edward IV

Under Edward IV the establishment of the Secretary doubled in size—an indication of increasing importance not lost upon modern Heads of Departments. He now had four clerks and 'sufficient writers of the King's signet', a 'gentleman to attend on him', and 'three persons wayters on him for all that office'. He had his appointed Commons at Court—'three loaves, two messes of great meat, half a pitcher of wine and two gallons of ale', he had 'one toich, one percher, two candels wax, three candels paris', while parchment, paper, and red wax were supplied to him by the office of the Great Spicery ²

A Second
Secretary

Meanwhile the work of the Secretary was increasing so fast that in 1433 a second Secretary had been appointed for the transaction of the King's business in France, though as there was as yet but one signet, the second Secretary being appointed by patent. In 1464, however it was laid down that in the absence of Edward Hatcliffe, 'our Secretary and Councillor', one Oliver King, 'the King's first and principal Secretary in the French language,' was to have the custody of the signet and was 'to receive all kinds of bills and warrants whatsoever addressed to the Chancellor, or to the Privy Seal together with all letters as well in Latin as in English, and to receive the accustomed fees' ³

It is perhaps premature to see in the appointment of a second Secretary to deal primarily with French affairs the beginning of a bifurcation—not destined to become definite and final for more than three centuries—between the Home Office and the Foreign Office, nevertheless the appointment at least affords evidence of the growing importance of the office. Further evidence of a similar

¹ *Rolls of Parliament*, v, p. 216. Cf. also Gretton, *op cit*, p. 29.

² *Ap Gretton*, p. 30.

³ Miss Evans, *op cit*, pp. 102-4, and *Cal S P Dom* 1639-40, pp. 332, 433, *ap Gretton, op cit*, p. 51.

tendency is afforded in 1476, when for the first time a newly appointed Secretary is described as the 'Principal Secretary'—not, as it would seem, to denote a difference in the rank of the two Secretaries, but to mark the responsible character of the office as distinct from that of a mere clerk or amanuensis. For some time to come the appointment of a second Secretary was fitful, only in the reign of James I was the practice definitely established. From 1539, however, there were two signets and two books of warrants in the keeping severally of the two Secretaries. In 1640 a further step was taken. On the appointment of Sir Henry Vane, in that year, the foreign business of the office was formally divided. Secretary Windebank was to have charge of the business with Spain, Italy, and Flanders, Vane himself of that with France, Germany, Holland, and the Baltic. In fact this was only the formal recognition of an arrangement which had in practice been adopted since the reign of James I, but it formed the basis of the organization of the Northern and Southern Departments which lasted until 1782. The *rationale* of the arrangement was not, however, geographical, as the titles would seem to suggest, but religious and political. James I aspired to the position of mediator between the warring creeds of Europe, and in conformity with that aspiration he selected one Secretary as a *persona grata* to the Protestant Powers, the other to the Catholics. The differentiation of duties indicated in Secretary Vane's dispatch to Sir Thomas Roe did not, however, precisely correspond with lines of ecclesiastical divisions.

Long before this differentiation important developments had taken place in the position of the Secretary. The Tudor Dictatorship marks a significant stage in the evolution of the ministerial system as in that of Parliament. The two are, indeed, closely connected. By a Statute of 1539 the attendance of the Secretaries of State in Parliament and their precedence therein is minutely regulated. Moreover, the King's Secretary has by that time ceased to

The Secretaryship under the Tudors

be merely a Household or Court official, he has become one of the highest, he is soon to become indisputably the highest among the officers of the realm. Thus may perhaps be regarded as a natural consequence of the personal government of a series of great rulers. But the Tudor Dictatorship was more than personal, Henry VII, Henry VIII, Edward VI, Mary, and Elizabeth, all made Parliament the instrument of their government. The exaltation of the power of the Crown may have exalted the King's servant—the beloved clerk who stays continually at our side,—but in exalting it also tended to transform him. The King's Secretary, though not yet a Parliamentary Minister, must take his place in Parliament, and must learn the arts of governing, if not yet of persuading Parliament.

The Sec-
retaries in
Parlia-
ment

The Statute of 1539 ordained that the Secretary, as well as the Lord Chancellor, the Lord President of the King's Council, and the Lord Privy Seal, should attend Parliament. If any of these great officers of State should be under the degree of a Baron of Parliament they should sit 'at the uppermost part of the sacks in the midst of the said Parliament Chamber.' Later it was ordained that when the King or the Speaker was present in the House of Lords—that is, when any formal business was to be transacted—both the Secretaries were to be on the wool-sacks.¹ Otherwise they were to sit alternately, week by week, one in the House of Lords, and one in the House of Commons, but if important matters were before the Commons the presence of both Secretaries in that House might be required.² Edward VI, when making rules for the conduct of business in the Council, made his Secretary the medium of communication between the King and the Council or its Committees.

The
Tudor
Secre-
taries

To recall the names of some of the Secretaries of the sixteenth century is sufficient to establish the impor-

¹ Formal business still requires the presence of the King (in person or by Commission) and of the Speaker, in the Parliament Chamber, now specifically designated the House of Lords.

² Gretton, p. 33

tance of the office Richard Fox, Bishop of Winchester, and Thomas Ruthall, Bishop of Durham, held office under Henry VII. Fox's pupil, Wolsey, brooked no rival during his ascendancy, and Thomas Cromwell—the first layman to hold the office of Secretary—was indisputably the first Minister of the realm. Sir William Cecil (afterwards Lord Burleigh) occupied as Secretary (1558–73) almost the position of a Prime Minister under Elizabeth. When in 1573 he accepted the formally higher office of Lord High Treasurer he found in Sir Francis Walsingham, who succeeded him as Secretary, a dangerous rival, but after Walsingham's death (1590) he was able 'to keep the office vacant for six years and then to secure it with undiminished powers for his son Robert Cecil'.¹

Robert Cecil, afterwards Earl of Salisbury, occupied a place in English politics during the last years of Elizabeth and the first years of James I (1590–1612) even more dominating than his father's. But after his death the ear of the King was given to favourites rather than to Ministers, and though men of distinction like Coke, Vane, Falkland and Thurloe, Sunderland and Godolphin subsequently held the office, the Secretaryship never quite regained the pre-eminence given to it by the Tudor Secretaries, until a day came when the Secretaryship had to yield pride of place if not of place to a Prime Minister, who might or might not be a Secretary of State as well.² In the meantime various Departments and Boards had been set up, the history and functions of which will presently demand attention.

The germ of those specialized offices is to be discovered in the two great offices of State whose evolution has now been traced. For that reason, no excuse need be offered for exploring in some detail the genesis of the Treasury and of the Secretaryship of State, though it will suffice to indicate in brief outline the subsequent history of the latter office.

A third Secretary of State (for Scotland) was added

¹ Troup, *op cit*, p. 12.

² Cf. *supra*.

after the Union in 1708, but in 1746 the number was again reduced to two. A third Secretaryship (this time for the Colonies) was established in 1768, only to be abolished after the recognition of American independence in 1782. In that year the work of the office was reorganized: the Northern Department was transformed into a Foreign Office; the Southern into a Home Office responsible also for Ireland, which in the same year was granted legislative independence under the Grattan Constitution, and for the few colonies which survived the great disruption of 1782.

New
Secretary-
ships of
State

The simplicity of this arrangement was soon, however, rudely disturbed. The exigencies of the struggle with France brought a third Secretary (for War) into existence in 1794, and the Colonies were added to his Department in 1801. The Crimean War led to the assignment of responsibility for Military and Colonial Affairs to two separate Secretaries in 1854; the transference of the dominions of the East India Company to the Crown raised the Secretariat to five in 1858; and the growing importance of aerial warfare demonstrated by the Great War led in 1917 to the appointment of a sixth Secretary of State for Air.

Work of
the Home
Office

The existing powers of the Home Secretary are partly an emanation from the Royal Prerogative, and, in even larger part, are the result of the feverish legislative activity of the nineteenth century.

Preroga-
tive
Powers

Many of the Prerogative Powers of the Crown have been ministerially assigned to other Departments of State, notably to the Foreign Office, the War Office, and the Admiralty, but the Home Secretary has been aptly described by President Lowell as 'a kind of residuary legatee'. He is responsible for the exercise of the Prerogative of Mercy and for the maintenance of the King's Peace. The responsibility for calling out the troops in cases of civil disturbance rests with him, and for the action of the magistrates and police. He is the channel of communication between the Sovereign and his subjects, and has formal duties in connexion with the grant of honours, alike

to individuals and to localities, including such matters as the right of an institution, society, or club to use the title *Royal*. He is also the proper medium of communication between the King as head of the Church of England and the Church. He submits to the King the warrant for the issue of Letters Patent under the Great Seal authorizing the election of a Bishop by *Congé d'élire*, and he presents the Bishop elect when he does homage for the temporalities of the see. He issues His Majesty's instructions to Lords-Lieutenant, magistrates, Governors of Colonies, the warrants for certain appointments under Letters Patent pass through his hands, and in particular he is responsible for the appointment of Royal Commissions.

The duties imposed upon the Home Secretary by statute are complex and multifarious. He is at once Minister of Justice and, to a large extent, Minister of Industry, though of some of the functions implied in the latter title he has been recently relieved. The administration of Justice, the control of the Metropolitan Police, of Prisons, Probationary and Industrial Schools, Criminal Lunatic Asylums, the control of immigration, the registration, supervision, and deportation of aliens, naturalization, the sale of intoxicating liquors and dangerous drugs, the safety of the public in theatres and picture-houses, their protection against fires, explosives, fire-arms, the guardianship of public morals, and the preservation of public amenities, the administration of Factory and Shops Acts, of Truck Acts, and of Workmen's Compensation Acts—all these things come within the province of the Home Secretary. He has to approve local by-laws and is responsible for the conduct of Parliamentary and local elections. Scotland, Northern Ireland, the Isle of Man, and the Channel Islands are all, in some measure, under his jurisdiction.

Statutory
Duties

The classification of duties assigned to the Home Office is anything but scientific, and if ever the reorganization of the Departments of the Central Government should be taken seriously in hand the Home Office would probably

be transformed almost out of recognition. Yet the Home Secretary would still, it must be assumed, take that precedence among the Secretaries of State which is historically his. He remains, *par excellence*, the Secretary of State, the special servant of the King, and of all Cabinet Ministers, except the Prime Minister, he is still in closest personal contact with the Sovereign.

Staff The work of the Home Office is now done by a staff of 975 persons, as compared with 26 at the end of the eighteenth century, and with 30 in 1832. The net estimate for the current year (1925-6) is £418,744. Of this sum over £150,000 is accounted for by the inspection of factories and workshops—a branch of the work which employs a staff of 293 persons. 167 persons are employed in executing the Aliens' Restriction Acts at a cost of £61,000. On the whole it must be said that, in view of the variety and complexity of the functions imposed upon the Department, the staffing and expenditure are relatively modest.

The Foreign Office Less varied but even more responsible is the part played in the economy of the State by the Foreign Office, which as an independent establishment dates only from 1782. The total staff of the Office, including King's messengers, but excluding the staff of the Diplomatic and Consular Service, is 880, and the gross estimate is £299,427, but the appropriations in aid (mostly derived from passport fees) (£105,000) reduce this total to a net sum of £193,170. The maintenance of the Diplomatic and Consular Services costs in addition £1,094,124.

The Crown and Foreign Affairs The work of the Foreign Office, important as it is, calls for no detailed analysis. Apart from the Passport Office, which is financially self-supporting, the staff, in relation to the work done and in comparison with more modern Departments, is not a large one. One observation must, however, be made. The political head of the Foreign Office stands in a special relation to the Sovereign, and Queen Victoria manifested special interest in the appointment to this office. Though responsibility rests entirely

with the Secretary of State and the Cabinet, the Sovereign has, by tradition, exercised a more direct influence over the conduct of foreign than over that of domestic affairs. To what extent that tradition will be maintained after the adoption of the republican form of government by so many of the Continental States it is impossible to predict. Ambassadors are, however, accredited personally to the Sovereign and all important dispatches to foreign Governments are submitted to him. Nor is the Sovereign's assent a mere formality.

Upon the observance of this rule Queen Victoria inflexibly insisted, and the neglect of it practically cost Lord Palmerston his place when he was almost at the zenith of his popularity in the country (1851). Nor can it be doubted that the custom has contributed both to the continuity and the success of our foreign policy. The less our diplomacy is deflected from its traditional lines by party mutations at home, the better for this country and for its neighbours. Happily there are not wanting signs that Foreign Affairs are coming to be regarded, in increasing degree, as outside the domain of party politics. This is partly the cause and partly the effect of the continuously exercised intervention of the Sovereign. But one point must be emphasized. No whif of responsibility attaches to him, any more than to the permanent Under-Secretary. Influence they both exercise in full measure, the Secretary of State alone bears responsibility.

Next in seniority to the Home and Foreign Secretariats is that for the Colonies. The history of the office is instructive. On the reorganization of the Privy Council after the Restoration Charles II created a Council of Trade and a Council of Foreign Plantations. These Councils were combined in 1672, but the combined Council existed only for three years. In 1695 William III revived it as the 'Board of Trade and Plantations'. By this Board the Colonies or Plantations were administered, so far as the casual control exercised down to 1768 could be described as 'administration'. By that time we were already involved in acute

Colonial
Office

controversy with the American Colonies, and it was thought desirable to create a third Secretaryship of State to deal with Colonial affairs. In 1782 the most important part of the Colonial Empire had ceased to be, the separate Secretaryship was, therefore, abolished, and the residue of work was transferred to the Home Office. In 1801 Colonial business was transferred once again to the new Secretary of State for War, created, as we have seen, in 1794. The new Department henceforward became known as that for War and the Colonies, until in 1854 a separate Secretaryship for the Colonies was created. From that time onwards the office steadily grew in prestige and importance until, in 1895, it received a fresh access of dignity by being selected as the special sphere of his activities by the most prominent of the leaders of the Party then in power.¹

The Colonial Office is not responsible for all the overseas territories of the Crown. India, as already indicated, has its separate Secretariat, various Protectorates are controlled by the Foreign Office, while the Channel Islands and the Isle of Man are under the jurisdiction of the Home Office.

The present cost of the Head-quarter's work of the Colonial Office is £177,473, but to this must be added £1,216,207 for sundry colonial services, such as passages of Governors and other Colonial officers, salaries of High Commissioners, grants in aid of local revenues in such places as Tanganyika, Uganda Railway annuities, &c. The Middle-Eastern Services—expenditure in connexion with the Iraq and Palestine Mandates and with Arabia—call for an additional £4,770,000, and the work of Oversea Settlement for £497,925, the latter being mainly expended in connexion with the Empire Settlement Act of 1922. Since the war there has been a notable decrease in emigration, not least in migration to the British Dominions overseas. In 1913 the total number of emigrants

¹ In order to reflect more accurately the new status of the Self-governing Dominions, the term 'Dominions' has, since 1925, been substituted for that of 'Colonies' in the style of the 'Colonial' Office and its chief, the Secretary of State.

was 701,691, of whom 331,450 went to the Dominions. The outward flow of population ceased during the war, and has been only slowly resumed. In 1923 the total was 463,285, of whom 260,271 went to the Dominions. Partly in order to deal with the settlement of ex-service men and partly for other reasons it was deemed desirable for the State to assume more direct responsibility for oversea settlement. Consequently a special committee was set up at the Colonial Office originally known as 'The Government Emigration Committee', but now more happily renamed as 'The Oversea Settlement Committee'. The Secretary of State for the Colonies is President and the Parliamentary Secretary of the Department of Overseas Trade is Chairman of the Committee, while the Parliamentary Under-Secretaries for the Colonies and of the Ministry of Labour are ex-officio members of it. The mere mention of these sub-Departments is significant of the rapid development of the work of the Colonial Office. To the overwhelming importance of that development reference has been already made, but this word may be added. Were that development to be arrested or even to slacken in intensity it would be indeed ominous for the future of the British Empire.

The history and organization of the War Office must be treated not less summarily, partly because a civilian cannot be trusted to apprehend and still less to describe it with accuracy, and even more because of all the great offices of State it has known least of continuity or of finality. A system described with reasonable accuracy to-day may by to-morrow be out of date.

The War
Office

The Army has always been in a peculiar sense under the control of the Crown. The command of it was, as a competent writer has observed, 'the last of the royal prerogatives to be brought under the principle of ministerial responsibility'.¹ This was due partly to the anxiety of the Crown to retain it, still more perhaps to the reluctance of Parliament to admit that a standing army was anything

¹ Traill, *Central Government*, p. 95

more than a disagreeable and temporary expedient, to be dispensed with as soon as circumstances permitted. Circumstances have obstinately forbidden such a consummation, but the War Office, which was first organized under Charles II, was, until relatively recent times, conspicuous for the confusion which would naturally be expected in an organization designed for temporary purposes. The confusion which characterized this Department down to 1855, and did not entirely cease in that year, is thus happily summarized by Sir William Anson: 'The soldier was fed by the Treasury and armed by the Ordnance Board; the Home Secretary was responsible for his movements in his native country; the Colonial Secretary superintended his movements abroad; the Secretary at War took care that he was paid, and was responsible for the lawful administration of the flogging which was provided for him by the Commander-in-Chief.'¹

The office of Secretary at War dates from the reign of Charles II. In 1676 a warrant, countersigned by one of the Secretaries of State, was issued to the Duke of Monmouth. Under this warrant all warrants and orders on military affairs were in future to be issued under the sign-manual and countersigned not by a military officer but by the Secretary of the Forces 'as by our command'. In 1683 the Office of Ordnance was reorganized on a civil basis, but until the definition of his functions by an Act of 1783 the position of the Secretary at War remained ambiguous. Like a Secretary of State he countersigned State documents and thus authenticated the sign-manual of the King, but he was not technically a Secretary of State, and in 1717 Pulteney—when fulfilling the office—formally repudiated his responsibility to Parliament. He was, he contended, 'a ministerial, not a constitutional officer, bound to issue orders according to the King's direction'. In 1783 the ambiguity was so far terminated that the Secretary at War was entrusted under Statute with definite functions—largely financial—to be per-

¹ *Op. cit.* II 375

formed under parliamentary sanction and responsibility. In 1793 the King surrendered the personal command of the armed forces to a General Commanding-in-Chief, and a year later (as already described) a Secretaryship of State for War was established.

From 1794 to 1887 the Commander-in-Chief and the Secretary of State occupied joint thrones, located at the Horse Guards and the War Office respectively. The dual control thus established over the Army, and prolonged by the fact that the Commander-in-Chief was almost invariably a Royal Prince, was not terminated until 1887, when by Order-in-Council the whole administration of the Army was confided to the Commander-in-Chief. Simultaneously that officer was himself made responsible to the Secretary of State. In 1895 the Duke of Cambridge was induced to resign the office which throughout a great part of his cousin's reign he had filled, and in 1904, after the Boer War, the office of Commander-in-Chief, having subsisted for a little more than a century, was abolished.

Meanwhile the Secretaryship of State for War had emerged as a differentiated and substantive office. Constituted in 1794, its functions were confused in 1801 by the absorption of colonial business, and still more by the continued existence of the Secretary at War. But the War and Colonial Secretaryships were bifurcated in 1854, in 1855 the Secretary of State for War took over the duties of the Secretary at War, and the latter office was finally abolished in 1863. Meanwhile the control of the Commissariat was transferred from the Treasury to the War Office, the Board of Ordnance was abolished and its duties similarly transferred, and at the same time (1855) the War Office absorbed the Army Medical Department. Gradually order was being evolved out of chaos and the War Office was coming into its own. Since 1855 internal reorganizations have been not infrequent, but they have mostly tended in one direction. Control and responsibility have alike been concentrated in the Secretary of State, until at last in 1904 his great rival finally disappeared. The Secretary of State,

like the First Lord of the Admiralty, now obtains technical advice from a Board of professional experts. This Army Council now includes, in addition to the Secretary of State, the Parliamentary Under-Secretary and the Financial Secretary, the Chief of the General Staff, the Adjutant-General, the Quartermaster-General, and the Master-General of the Ordnance.

India
Office

A fifth Secretariat-Department is the India Office. In certain respects, to be noticed presently, the organization of this office is unique. Down to 1784 British India was ruled by the directors of a commercial company acting under Charter from the Crown and (since 1773) controlled to some extent by Parliament. The India Act passed by Pitt in 1784 established a dual control: it left the powers of the Company untouched as regards commercial affairs, but it transferred political responsibility to a Board of Control, consisting of six Commissioners, all of whom were to be Privy Councillors, and among whom were always to be the Chancellor of the Exchequer and one of the Principal Secretaries of State. The Court of Directors was at the same time given power to appoint a Secret Committee of three members, through whom the orders of the Board of Control were transmitted to India. From 1784 onwards the President of the Board of Control (almost invariably a Cabinet Minister) was virtually a Secretary of State for India, and controlled Indian administration with the assistance of the Secret Committee.

The formal change to the modern system was effected after the Mutiny. By an Act of 1858 British India was formally transferred to the Crown, and it was provided that 'all the powers and duties then exercised or performed by the East India Company should in future be exercised and performed by one of Her Majesty's Principal Secretaries of State'. For this purpose a fifth Secretaryship was, as we have seen, created. But the Secretary is, in theory at any rate, not a complete autocrat at the India Office. And this constitutes the peculiarity of his position. He appoints, and is assisted by, a Council

—the Council of India—which must be carefully distinguished from the Viceroy's Council, the latter appertaining to the local government of India. The former consists of fifteen members, of whom nine must have recently served or resided for ten years in India. Members of the Council are ineligible for seats in the House of Commons. They are all paid and meet weekly. This is no phantom Board like that of the Treasury, or the Trade or Education Boards. Its members are an integral part of the Government of India, without their advice the Secretary of State cannot, except in matters of secrecy or inquiry, act, and in certain important cases they have actually a power of veto. Apart from this Council the internal organization of the India Office, with its permanent secretaries, clerks of the first and second division, and so forth, differs only in detail from the rest of the executive Departments of the central Government. Yet in one important respect the India Office stands apart. Its expenses are mainly charged not upon the revenues of Great Britain but upon those of India. Parliament is only asked for the comparatively trifling sum of £115,100 'as a contribution to the cost of the Department'. Parliament pays the salary of the Secretary of State and of the Parliamentary Under-Secretary, but the rest of the vote takes the form of a grant-in-aid in respect of the expenditure of the India Office in this country on political and administrative services. This expenditure is not audited in detail by the Controller and Auditor-General, nor are unexpended balances surrendered, according to the ordinary rule, to the Exchequer.

The Ad-
mu- nity

The youngest of the Secretaryships of State was established in 1917 to administer the business of the Air Force¹. Only in 1912, indeed, had the Royal Flying Corps come into existence. Provision was then made for a Naval Wing and a Military Wing to be maintained and administered by the Admiralty and the War Office respectively. In order to secure co-operation between the two services a joint committee, known as the Air Committee,

The Air
Force

¹ Save for the Secretary of State for Scotland. Cf. notes, *supra*.

was formed, but, as was to be anticipated, friction arose between the two wings, and in 1914 the Naval Wing was reorganized as the Royal Naval Air Service, and by the outbreak of war the bifurcation was practically completed. War-time conditions served, however, to accentuate the competition between the two older services for the assistance of the new arm, and in 1916 an Air Board was set up to co-ordinate the demands of the Army and Navy and to reorganize the Air Service.¹

Out of this Board came the new Air Force Council under a new Secretary of State. The Council was set up by an Order-in-Council dated 21 December 1917, and the transfer of the Royal Naval Air Service and the Royal Flying Corps to the new Ministry was in the following year gradually accomplished. By degrees, a separate, independent, and self-contained force was set up. Thus, soon after the Armistice, the Technical Department of the Ministry of Munitions, concerned with the supply of *material*, was transferred to the new Ministry. The latter also took over the control of meteorological research and of civil aviation.

The members of the Air Council are, in addition to the President and Vice-President—the Secretary of State and the Parliamentary Under-Secretary—a Chief of the Air Staff, who is responsible for the conduct of air operations, for advising the Government on all questions of air policy and for the organization and training of the Air Force, an Air member of Personnel whose functions correspond generally with those of the Adjutant-General of the Army, an Air member for Supply and Research, an additional member and Deputy Chief of the Air Staff who is Director of Operations, and a Secretary who is primarily responsible for finance and contracts. The sub-Departments of the Ministry correspond broadly to the functions of the several members of the Council, the Directorate of Civil Aviation being in the Department of the Under-Secretary of State.¹

¹ Cf. *Official Report of Parliamentary Debates* (Fifth Series), vol. 99, col. 126 seq., vol. 103, col. 957 seq., vol. 123, col. 127 seq., vol. 126, col. 1579.

GREAT OFFICES OF STATE

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The estimate of the Ministry for the current year (1925-6) amounts to £15,513,000, and the staff, exclusive of Unit and Command Office Staffs (which number over 1,900), numbers 1,819. The Ministry is represented in Parliament by a Secretary of State and an Under-Secretary, whose right to sit and vote in the House of Commons was specially provided for by a section of the Air Force (Constitution) Act which raised the number of Principal Secretaries of State and Under-Secretaries 'capable of sitting and voting in the Commons House of Parliament' from four to five.¹

XXIX THE PERMANENT EXECUTIVE (3)

The Departments of State Boards Ministries and Miscellaneous Offices

'The English offices have never since they were made been arranged with any reference to each other, or rather they were never made but grew as each could'—WALTER BAGEHOT

'The laws reach but a very little way. Constitute Government how you please, infinitely the greater part of it must depend upon the exercise of powers which are left at large to the prudence and uprightness of Ministers of State. Even all the use and potency of the law depends upon them. Without them your Commonwealth is no better than a scheme upon paper and not a living active effective organization'—EDMUND BURKE

'Our investigations have made it evident to us that there is much overlapping, and consequent obscurity and confusion in the functions of the Departments of Executive Government. This is largely due to the fact that many of these Departments have been gradually evolved in compliance with current needs, and that the purposes for which they were thus called into being have gradually so altered that the later stages of the process have not accorded in principle with those that were reached earlier. In other instances Departments appear to have been rapidly established without preliminary insistence on definition of function and precise assignment of responsibility'—*Report of Haldane Committee on the Machinery of Government (1917)*

HAVING dealt in the preceding chapter with these Departments of State which have developed from the protoplasm of the King's Secretary we pass to other Departments, some of which trace their origin to some high officer of the State, such as the Lord High Admiral, some of which derive from the Privy Council and its Committees, while others again have been created to meet the circumstances of the hour.

The Admiralty is not a Secretariat but a Board representing, like the Treasury, a great and historic official whose duties are now and have long been performed by commissioners. The office of Lord High Admiral dates from the fourteenth century, but, except in 1827 when the

The Admiralty

Duke of Clarence held it, the office has been continuously in Commission since the death of the consort of Queen Anne in 1708. Under Edward III there was a 'clerk of the ships, galleys, barges, ballingers, and other the King's vessels', but not until a much later date was there a regular standing navy any more than there was a standing army.

Until the reign of Henry VIII the official description of the 'navy' was 'the ships in the King's Majesty's army on the sea', but from his reign we trace the gradual organization of a Department charged with the control of the Navy. The King maintained such ships as there were and victualled the officers and men, though, by 1546, we discern the germ of an Admiralty in the existence of a 'Controller of the Ships with two clerks, a Surveyor of the Ships with two clerks, and a Clerk of the Ships'—soon to develop into a Treasurer of the Navy. From Elizabeth's reign these officials were regularly located in an office in Crutched Friars in the City. By Charles II there was, in addition to the Navy Office in the city, a Victualling Department at Deptford and subordinate offices at Chatham, Portsmouth, &c. There was also an Admiralty Office located in the palace of Whitehall. While the Duke of York held the post of Lord High Admiral this office was known as 'the Duke of York's Chamber'. After his resignation in 1673 the office was put in Commission and the Lords of the Admiralty appear with a secretary and a staff of seven clerks established in the Admiralty Office. Of the first and second Boards of Admiralty both Secretaries of State were members. By the end of the eighteenth century naval business was distributed among five departments—the Navy Office with a staff of 160, the Victualling Office, 118, the Navy Pay Office, 73, the Admiralty, 45, and the Audit Office, 33.¹ In 1815 the numbers were Navy Office, 225, Victualling Office, 209, the Admiralty, 65, and the Audit Office, 125. These distinct depart-

¹ *Returns on Public Offices Employment, Accounts, Papers*, vol. 656, p. 300 (92 of 1830).

ments were, under a Statute passed in 1832, concentrated under the single Board of the Admiralty with a staff of 723 persons under a Minister responsible to Parliament. The authority of the Board extended to every branch of naval administration save the provision of guns. The charge for this item continued, for many years after the absorption of the Ordnance Office by the War Office, to be borne on the estimates of the latter, but in this, as in other matters, the Navy is now self-contained.

The staff of the Admiralty is now 8,502, as against 5,800 in the last pre-war year, having risen in the meantime under the exigencies of war to over 20,000.

The Board of Admiralty, like the Army Council and the Council of India, but unlike the Treasury Board, is a reality. The First Lord is assisted in Parliament by a Civil Lord and a Financial Secretary, while his expert advisers on the Board are four naval officers of high rank. The First Sea Lord, who is also Chief of the Naval Staff, is responsible for strategy, tactics, and for the discipline of the Fleet, the Second is Chief of Naval Personnel and responsible for recruiting and education, the Third is Controller and responsible for Naval Construction, while the Fourth is responsible for supplies and transport. The Board also includes a Deputy and an Assistant Chief of the Staff and the Permanent Secretary. Finance is in the hands of the Parliamentary and Financial Secretary. The cost of the Navy is at present £60,500,000, as compared with £51,550,000 for the last pre-war year.

Another office generally included among the *Executive* offices is that which is presided over by the Postmaster-General, though, for financial purposes, the office is classed, and properly, with the Revenue Departments. Letter Post was first instituted, as a State concern only, in the reign of James I, and then only for letters to foreign countries 'for the benefit of the English merchants'. The service was extended to inland letters under Charles I.¹

The Post
Office

¹ Cf. *First Report of the Postmaster-General* (1845), which contains an excellent historical summary.

A proclamation was issued by that monarch in 1635 reciting that up to that time there had been no certain communication between England and Scotland 'wherefore he now commands his Postmaster for foreign parts to settle a running post or two, to run night and day between Edinburgh and London, to go thither and come back again in six days, and to take with them all such letters as shall be directed to any post town in or near that road' Similar posts were promised to Chester and Holyhead, to Exeter and Plymouth, for the Oxford and Bristol road, and for that leading through Colchester to Norwich. It will not escape notice how closely these lines correspond with the existing trunk lines of railways. In the early days of the experiment the Postmaster was allowed to take the profits, in consideration of his bearing the charges, but as the profits rapidly increased the office of Postmaster was farmed out, a vicious system which continued, as regards the by-posts, until the year 1799.

The first legislative authority (apart from an Ordinance of the Commonwealth) was contained in the Statute 12 Car II, c 35, and in 1663 the revenue of the Post Office, which was estimated at £21,000, was settled on James, Duke of York, and his heirs male in perpetuity. On the accession of James to the throne in 1685 this revenue, then valued at £65,000 a year, was vested in the Crown and became part of the Hereditary Revenues.

In 1710 an important Statute was enacted which formed, until 1837, the legal basis on which the Post Office rested. Under its provisions a General Post Office for the three kingdoms and the Colonies was established under an official known as Her Majesty's Postmaster-General.¹ As this office was created after the enactment of the Place Bill of 1707 its holder was excluded from a seat in the House of Commons, until he was rendered eligible, subject of course to the usual rule as to re-election on acceptance of office, by a Statute of 1866. From the time of Queen Anne onwards

¹ Down to 1823 the office was generally held by two postmasters of equal rank and authority.

the office has been one of some importance, and during the reign of George III was almost invariably held by a peer. Not, however, until after the middle of the nineteenth century was it regarded as a high political office. The first Postmaster-General admitted to the Cabinet was the Earl of Hardwicke, who held the office under Lord Derby in 1852. Viscount Canning was, as Postmaster, a member of Lord Aberdeen's Cabinet in 1853, and since that time the Postmaster-General has been invariably included in the Ministry and frequently in the Cabinet.

The business and functions of the Post Office have multiplied with amazing rapidity. A money-order office, first established in 1792, became a recognized branch of the establishment in 1839, a uniform penny post was established in 1839, a book post was established in 1846, a pattern or sample post in 1862, and an inland parcel post in 1883. Meanwhile the Post Office had established in 1861 a Savings Bank Department, in 1870 it took over the telegraphic service, and in 1911 the telephone service as well. Imperial penny postage was gradually introduced from 1898 onwards.

The Post Office has, however, become more than a carrier of mails and a transmitter of communications. It is the banker and the stockbroker of the poor, accepting their savings on deposit or investing them in Government securities, it distributes State bounty in the shape of old-age pensions, it acts as an insurance agent, and collects revenue for the State in return for licences, and by the sale of the appropriate stamps it collects contributions under the Health, Unemployment Insurance, and Contributory Pensions Acts.

It is little wonder that the staff of the office should have expanded rapidly. In 1797 it numbered 957, in 1827, 1,377, and in 1925, 184,766.

The gross revenue of the Post Office now amounts to the gigantic sum of £57,000,000, on which the profit to the State is about £4,000,000.

The success of the Post Office is frequently quoted as an argument in favour of the extension of the trading activities of the State. Without entering upon highly controversial ground, three things may be said: first, that the success of the Post Office, though respectable, is neither phenomenal nor unquestioned; secondly, that so far as it is substantial, it is attained under the protection of a rigid monopoly; and, thirdly, that those who desire to found upon it arguments for further experiments must prove that private management would not yield better results, as regards public convenience, commercial profit, initiative, and adaptability. This would be no easy task.

Board of
Trade

We pass next to two Boards which represent Committees of the Privy Council. Of these the oldest is the Board of Trade which started in the reign of Charles II (1662) as a Committee on Trade and Plantations, being designed primarily to assist the work of the Great Trading Companies, and in particular their trade with the Oversea Settlements. This joint Committee was abolished in 1675, but in 1695 was revived. Its primary functions were to promote the employment of the poor and to consider the removal of impediments to trade. The establishment of a Secretaryship of State for the Colonies in 1768 deprived the Joint Committee of some of its most important functions, but in 1782 the new Secretaryship of State and the Commissioners for Trade and Plantations were alike among the victims of Burke's consuming zeal for economy in public administration, the cost of the Committee on Trade being put, in that year, at something over £12,500.

The Committee on Trade could not, however, be spared at a moment when the whole industrial position of the country was undergoing a profound transformation, and when trade was expanding by leaps and bounds. Consequently the Committee was, in 1786, reconstituted by Order-in-Council, and in 1797 had a staff of nineteen persons. The Board now consists of a President and the following ex-officio members: the First Lord of the Treasury, the Secretaries of State, the Chancellor of the

Exchequer, the Archbishop of Canterbury, and the Speaker of the House of Commons. Its powers, however, can be and are exercised by a President who is almost invariably a Cabinet Minister. The staff of the Board in 1925 numbered 5,085, as compared with 2,500 in 1914 and with 26 a century ago (1827). In the course of the nineteenth century multifarious duties were imposed upon a Board which constantly increased in importance: in 1832 it was charged with the duty of collecting and publishing statistical information; after 1840 it was called upon to exercise a measure of control over railway companies; to it was committed the registration of joint-stock companies; the supervision of schemes for provision of light and power; weights and measures; navigation, astronomy, and insurance; the enforcement of the Acts for the regulation of merchant shipping; and the administration of the Bankruptcy Acts. From its inception in 1662 down to the outbreak of war the Board of Trade had indeed 'been the main repository of the relations of the Government with private enterprise in material production, whether in the form of stimulus, information, regulation, or prohibition'. Of late years the specialization in departmental activities has relieved it of nearly all its duties in connexion with railways and transport; with the development of electrical lighting and power; with Employment Exchanges and Trade Boards. Yet its functions are still multifarious and miscellaneous: industrial property and patents; trade designs and trade-marks; joint-stock companies; foreshores, and Crown property therein; lighthouses (shared with Trinity House and other authorities); wrecks and salvage; pilotage; coast-guard service; mercantile marine; not to mention various services (such as the Food Liquidation Department and the Clearing Office for enemy debts) arising out of the war, and the work of the Department of Overseas Trade which is now established in a semi-independent position.¹

This Department was formed in 1917 as a joint Depart-

¹ Cf. Report of Select Committee on Estimates (96 of 1924).

ment under the Foreign Office and Board of Trade. It is represented in Parliament by a Parliamentary Secretary, who holds the position both of an additional Parliamentary Secretary of State for Foreign Affairs, and also of an additional Parliamentary Secretary at the Board of Trade, and it employs a head-quarters staff of 390 persons.

The Department is concerned mainly with the promotion and development of Overseas Trade. In it was incorporated the former Department of Commercial Intelligence of the Board of Trade, and the Exhibitions Branch of the Board of Trade, certain duties previously performed by the Commercial Department of the Foreign Office were also transferred to it. It has in addition taken over from the Foreign Office the administration of the commercial services in foreign countries, e.g. the Commercial Attaché—now Commercial Diplomatic—Service and the Consular Service, of which the administrative control has been transferred from the Foreign Office to this Department, though the Consular Vote remains part of Class V for which the Foreign Office is responsible. The control of the Export Credits Scheme was in 1921 transferred from the Board of Trade to the Department of Overseas Trade.¹

The Board of Education
Parallel with the position of the Board of Trade is that of the Board of Education. In 1839 a Committee of the Privy Council was set up to supervise the distribution of the Parliamentary grants for elementary education, first made in 1833. Down to the year 1899 the supervision of education, so far as the Central Government was concerned, was vested mainly in this Committee. The nominal and sometimes the effective head of the Committee was the Lord President of the Council, though the effective head was more often the Vice-President of the Council on Education, who was sometimes, but by no means invariably, a member of the Cabinet. The Committee of the Council controlled what were virtually two distinct Departments—the Education Department and the Department of Science and Art—while a third body, the Charity

¹ Cf. Report of Select Committee on Estimates (96 of 1924).

Commissioners, exercised important functions in regard to endowed schools. An Act passed in 1899 created a Board of Education, on the model of the Local Government and other Boards, under a President, assisted by a Parliamentary Secretary and the usual secretarial staff. The President—except during the war-cabinet period—has invariably been a member of the Cabinet.

A reorganization of the Education Department had been recommended by the Report of the Royal Commission on Secondary Education (1895), and was necessitated by the passing of the Education Act of 1896. Already there had come into being 'local authorities of all kinds and of all dimensions': School Boards under the Education Acts of 1871 and 1876; county and borough authorities under the Technical Instruction Act (1889); and Committees of managers under the regulations of the Committee of Council. Some of these authorities were dispensing large sums of money raised locally, and all of them were dispensing Parliamentary grants. It was, therefore, in the highest degree anomalous that there should not be a central authority, possessing a status, and clothed with authority, at least equal to the Boards which supervised agriculture and trade. Moreover, further reforms in the local organization of education were pending, and central reorganization could not, therefore, be deferred. The new Board was accordingly constituted in 1899.¹

The Board of Education now employs an administrative staff of over 1,400 persons. There is, in addition to this, an Inspectorate of about 380 persons and a medical staff of 18. The Board is now responsible for the supervision of public elementary education, as well as for the inspection of a large number of secondary schools, of technological institutions, evening schools, schools of art and art classes, and training colleges. It makes grants to various forms of adult education and provides scholarships and maintenance allowances for students at colleges

¹ Cf. Duke of Devonshire in House of Lords, 1 Aug. 1898. *Parliamentary Debates*, 4th Ser., vol. 63, col. 666.

and universities. It is also responsible to Parliament for the Royal College of Art, the Victoria and Albert Museum, the Science and the Bethnal Green Museums. Even the great public schools—or some of them—do not disdain the imprimatur derived from inspection by the Board. The Parliamentary vote for the Board is now over £40,000,000, in addition to which some £30,000,000 is raised for education out of local rates. This expenditure, which relates to England and Wales only, compares with an expenditure of about £10,000,000 (taxes and rates) in 1891, and something less than £30,000,000 in 1911. A sevenfold increase in thirty years at least affords evidence of the anxiety of the State no longer to neglect the education of its masters. The Parliamentary vote to the Board of Education does not include Scottish education, which claims about £6,000,000 from Parliament, nor grants to Universities and colleges in England and Wales and to Welsh intermediate education (about £1,500,000), nor a total of some two and a half million pounds distributed among such institutions as the British Museum, the National Gallery, the London and Imperial War Museums, nor a certain sum for the encouragement of scientific and industrial research.

The
Ministry
of Health

The Ministry of Health represents the latest stage in a long stage of administrative evolution. The first stage was marked by the creation of the Poor Law Board which was set up in 1847 to carry on the work entrusted by the Poor Law Amendment Act of 1834 to a Board of Non-Parliamentary Commissioners, who had rendered, be it remarked, an incomparable service to the State in a most critical period of our social history. A second stage witnessed the constitution in 1848 of a General Board of Health to superintend the execution of an Act passed in that same year to promote the public health by improved water-supply, drainage, cleansing and paving in 'towns and populous places'. This Board lasted only until 1858, and after that year the Home Office supervised the provision of labourers' dwellings, drainage schemes, baths and washhouses, with other detailed functions of local

government, and the registration of births, marriages, and deaths. The Privy Council remained responsible for public health and the administration of the Vaccination Acts.

The Local Government Board was constituted in 1871. It was to consist of a President and certain *ex-officio* members: the President of the Council, the Secretaries of State, the Lord Privy Seal, and the Chancellor of the Exchequer. The new Board superseded the Poor Law Board and took over its functions. It also took over from the Home Office the powers, vested by a long succession of statutes in the Home Secretary, in respect of Registration of Births, Deaths, and Marriages, Public Health, Local Government, Drainage and Sanitary matters, Baths and Washhouses, Towns Improvements, Artisans' and Labourers' Dwellings, Local Taxation Returns, &c. From the Privy Council the new Board took over the administration of the Vaccination Acts and a number of other Acts for the Prevention of Disease.

In 1919 the Local Government Board was in turn superseded by the Ministry of Health,¹ which was established to take over, in respect of England and Wales, all the powers and duties of the Local Government Board, of the Insurance Commissioners, of the Board of Education with respect to the health of expectant mothers and of young children not at school, and the medical inspection and treatment of school children, certain powers of the Privy Council in regard to midwives, and of the Home Office in regard to infant life protection.

The Ministry of Health is now one of the most important Departments of State. It is represented in Parliament by a Minister of the first rank and by a Parliamentary Secretary, the staff of the Ministry now (1925) numbers 3,838, having exceeded 6,000 in 1921, while the expenditure for which it is responsible is not far short of £20,000,000. The main functions of the Department are the supervision, in conjunction with the Voluntary Benefit Societies, of Health Insurance, the administration of the Poor Law, of the

¹ 9 and 10 Geo. V, c. 21.

Housing Acts, a variety of Public Health functions, such as vaccination and tuberculosis treatment, sanatoria, maternity and child welfare, and the welfare of the blind

Within its wide-embracing jurisdiction also come local legislation, loans, and local rates, allotments, libraries, recreation grounds, gymnasiums, apprenticeships, food adulteration, water undertakings, local charities, markets and fairs, milk supply and dairies, and a multitude of other cognate matters¹

The
Ministry
of Agri-
culture

Like the Boards dealt with in the preceding paragraphs the Ministry of Agriculture and Fisheries owes its parentage to the Privy Council. Its immediate predecessor the Board of Agriculture was constituted in 1889 to take over certain duties from the Privy Council and the Land Commissioners. In 1903 the duties of the Fisheries Department of the Board of Trade were transferred to the Board of Agriculture, the designation of which was at the same time altered to accord with its extended functions. Finally, in 1919, the Board was transformed into a Ministry, and on the new Ministry further and important duties were imposed.

The Ministry is now entirely responsible for agricultural education and research, it deals with the diseases of animals, the improvement of live-stock, the breeding of horses, with agricultural credits and co-operation and with the investigation and development of Fisheries. It has been entrusted by Parliament with the expenditure of large sums for the promotion of land-settlement schemes (especially the settlement of Ex-Service men), with the expenditure of the Beet-sugar subsidy (now amounting to £1,000,000), and with the administration of the Acts for the regulation of agricultural wages. For these and other purposes it requires from Parliament a vote of nearly £3,500,000, as compared with £414,092 in 1913-14. It employs a staff of 2,578 and is represented in Parliament by a Minister, who has, of late years, invariably been included in the Cabinet, and a Parliamentary Secretary.

¹ Report of Select Committee on Estimates (127, 142 of 1925)

H M Office of Works is placed under the control of the Commissioners of Works and Public Buildings, consisting of a First Commissioner, the Principal Secretaries of State, and the President of the Board of Trade. The First Commissioner is a Parliamentary Minister, and not infrequently is included in the Cabinet, but politically the office has never been regarded as of sufficient importance to justify the appointment of a Parliamentary Under-Secretary.

Office
Work

The management of public works and buildings was vested by an Act of 1832 in the Commissioners of Woods and Forests, a body of persons who were and are primarily charged with the duty of administering the landed estates of the Crown and collecting the revenues arising therefrom. Down to 1851 the Commissioners were accustomed to use part of the revenue derived from Crown lands to maintain the public parks and buildings for which they were responsible. The expenditure on these objects tended to increase, and it was deemed proper to bring it under the direct control of Parliament. Accordingly, in 1851, the Board of Public Works and Buildings was set up as a separate entity and to take over certain of the duties hitherto vested in the Commissioners of Woods and Forests.

The work of the Department has increased very rapidly, and during the war was exceedingly onerous and responsible. It may be classified as follows: (1) the erection of any new buildings required for the public services, (2) the maintenance, repair, alteration of existing public buildings, including the Palace of Westminster, the Royal Palaces, and the Royal Parks, Diplomatic and Consular buildings, Legal buildings, Art and Science buildings, and so forth, (3) the administration and maintenance of the Osborne Convalescent Home for Naval and Military Officers, and (4) works carried out on repayment or loan terms for other departments, such as the Post Office, the Ministries of Labour and Pensions and others. The Parliamentary vote for this Department now amounts to about £7,500,000, as compared with a sum just under

£2,500,000 for the last pre-war year. The administrative staff now numbers 1,683, as compared with 770 on 1 August 1914.

The land revenues of the Crown are collected, as indicated above, by the Commissioners of Woods, Forests, and Land Revenues. When these revenues were surrendered by George III (1760) the net return was about £11,000. In the year ending 31 March 1924 the gross receipts were no less than £1,493,491, of which over £900,000 was paid into the Exchequer as net revenue.

The
Duchies
of Lan-
caster and
Cornwall

From the arrangement under which the Crown lands were handed over to the State in return for a Civil List, the Crown Duchies of Lancaster and Cornwall were, as we have seen, excluded. The former is an appanage of the Sovereign, who as Duke of Lancaster receives the net revenues of the Duchy. The affairs of the Duchy are managed by a Chancellor, who is a high political official always included in the Ministry and not infrequently in the Cabinet. As the duties of the office are light it is generally conferred upon a statesman whose counsel and advice are desired by the Prime Minister, but one who does not desire administrative duties or for whom no appropriate office is available. The Chancellor appoints a Vice-Chancellor who must be a lawyer of distinction and who presides over the Chancery Court of the Duchy, an Attorney-General for the Duchy, and the County Court judges and their subordinates. The salaries of the Chancellor and of the other officials are charged upon the revenues of the Duchy and not upon the Consolidated Fund. Strictly speaking, therefore, the Chancellor, though a Parliamentary Minister, is not responsible to Parliament, but solely to the Crown.

Still more remote from Parliamentary control is the Duchy of Cornwall which, since its creation by Edward III, has been the appanage of the eldest son of the Sovereign, and has provided a large part of his income. The Prince of Wales is assisted in the administration of the Duchy by a Council which includes a Lord Warden of the Stannaries,

who is also Keeper of the Privy Seal, an Attorney-General, a Receiver-General, and others

From the time of the Act of Union (1707) down to 1885 the connexion between the Executive business of England and Scotland was maintained chiefly through the Secretary of State, though the Lord-Advocate for Scotland, sitting in the House of Commons, acted as an Under-Secretary of State and exercised large administrative powers. In 1885 a Secretary for Scotland¹ was created by Statute and to him were transferred the control of Education, of the Poor Law, Lunacy, Public Health, Fishery Boards, Police, Prisons, and other matters of a similar kind. The new Secretary for Scotland also became Keeper of the Great Seal of Scotland. In addition he is at once Home Secretary, Minister of Education, and Minister of Health. He is capable of sitting in the House of Commons and is a member of the Ministry and usually of the Cabinet. In Parliament he is assisted by an Under-Secretary for Health, as well as by the Lord-Advocate and the Solicitor-General for Scotland. Scotland possesses, however, its own Board of Agriculture (though the Board is not separately represented in Parliament), its own Fishery Board, and Inland Revenue Office. Some of the administrative offices, particularly the Education Department, have a nucleus of officials in London, though the main work of the Departments is transacted at Edinburgh.

The
Scottish
Office

From 1800 to 1920 Ireland was an integral part of the United Kingdom, but as already indicated it retained certain symbols of the more independent status it enjoyed before the Act of Union. The Lord-Lieutenant, the Lord Chancellor, and the Chief Secretary to the Lord-Lieutenant virtually constituted the Irish Executive. Ireland also had its own Law Officers. The Lord-Lieutenant resided at the Viceregal Lodge in Dublin, his Chief Secretary had an office in the castle and another in London. At different times the Lord-Lieutenant, the Lord Chancellor, and the Chief Secretary have been included in the Cabinet, some-

Ireland

¹ Now (1926) a Secretary of State

times two out of the three officials have simultaneously been in the Cabinet

The legislation of 1920 and 1922 brought this state of things to an end

The Act for the Better Government of Ireland (1920) provided for the establishment of two Parliaments at Belfast and Dublin respectively and for Executives severally responsible thereto. Each Parliament was to contribute twenty members to an all-Ireland Council, which was intended to form the nucleus for an all-Ireland Parliament. As regards Southern Ireland the Act of 1920 was stillborn, Northern Ireland reluctantly accepted it as at least preferable to subordination to a Dublin Parliament, and has worked it loyally and successfully. Northern Ireland enjoys a restricted representation (thirteen members) in the House of Commons, and by that representation retains some legislative connexion with Great Britain. Such Executive connexion as subsists is maintained through the Home Secretary.

By the Statute passed in 1922¹ to give the force of law to the agreement for a Treaty between Great Britain and Ireland, Southern Ireland was constituted a Free State with the same Constitutional status in the British Empire as the other great Dominions. It has its own Parliament and an Executive responsible thereto, with a Governor-General appointed in like manner as the Governor-General of Canada. The Irish Free State has, therefore, passed under the control of the Colonial Office.

During the war, as was indicated in the preceding chapter, there was necessarily an immense development of governmental activities, and consequently there came into being a large number of new Departments. Of those which have survived the war some description will be given in subsequent paragraphs. The majority have happily ceased to exist and a detailed analysis of their activities is, therefore, uncalled for. The fact of their

War-time
Departments

¹ 12 Geo V, c 4. Cf also Irish Free State (Consequential Provisions) Act, 13 George V, c 2.

temporary existence is of some historical interest, but their titles are, in most cases, sufficiently indicative of the purpose for which they were set up, and a bare enumeration must suffice. The largest of the war-time Departments was the Ministry of Munitions which, at the date of the Armistice, had a total staff of no fewer than 65,142.¹ The Ministry had indeed become, in Dr Addison's words, 'not only the biggest purchasing organization in the world, but also the largest selling and distributing agency,' not to mention its primary work of production of guns, ammunition, 'tanks', aircraft, and what not. Its staff included 'perhaps the most remarkable aggregation of men and women of diverse qualifications and attainments'—business and commercial men, scientists, lawyers, literary men, travellers, soldiers, and sailors—ever got together in the world.² After the Armistice it was reconstituted as a Ministry of Supply, and in that capacity was mainly responsible for the disposal of the immense accumulation of surplus stores. The remarkable success which, in the latter capacity, the Ministry achieved was due primarily to the unselfish service rendered to the State by certain business men of outstanding capacity, and cannot be accepted as an argument in favour of the continuation or renewal of the experiment. The Ministry of National Service dealt with the difficult problem of man power and recruiting, the Ministry of Food, organized with conspicuous ability and courage by such men as Lord Rhondda and Lord Devonport, and backed up in the War Cabinet by Lord Milner, dealt with the supply and the rationing of food. Closely connected with the supply of food was the supply of shipping. To deal with the latter problem—a problem which as early as 1916 threatened to become insoluble—a Ministry of Shipping under a Shipping Controller was set up in December 1916, and, under Lord

¹ Cf. *Reports of Committee on Organisation and Staffs* (Bradbury Committee) Cmd 9220 (1918), Cmd 61 (1919), and Cmd 2428 (1925).

² For an interesting account of the multifarious activities of this Department, cf. speech by Dr Addison, then Minister, in *Official Report*, vol. xciv, pp. 558 seq., and Addison, *Politics from Within*, II, c. 7.

Maclay, rendered invaluable service to the State. In June 1918 the staff of the Ministry numbered 1,723 persons and cost £254,156 per annum. A Ministry of Blockade was formed in connexion with the Foreign Office and was itself responsible for a number of new Departments—the Contraband, Statistical, War Trade Intelligence, the Foreign Trade and Finance, and the Restriction of Enemy Supplies Departments. The Prisoners of War Department was attached to the Foreign Office itself, and the Trading with the Enemy Department to the Treasury.

No fewer than three separate Departments were set up 'to act as organs of Government policy',¹ to disseminate information and to suggest schemes of 'reconstruction' after the war. The Ministry of Information had a Head-quarter's staff of 526, and, in addition to much gratuitous service, a salary list amounting to £77,302 per annum. These figures include the Department of Propaganda in Enemy Countries which, though independent of the Ministry of Information, did analogous work. Other publicity work was confided to a War Aims Committee, which consisted in part of members of Parliament (unpaid), and in part of somewhat highly paid officials. The Ministry of Reconstruction was set up under the new Ministries Act of 1917, and was charged with the duty to 'consider and advise upon the problems which may arise out of the present war and may have to be dealt with upon its termination'. Its functions were, therefore, singularly vague, and though it assembled a staff of 112 persons at a cost of £24,935 per annum, the tangible results of its labours have fallen far short of the enthusiasm with which it was inaugurated. It produced a large number of pamphlets—largely popular epitomes of more elaborate Blue-books and Reports—and initiated some important investigations. But the zeal for 'reconstruction' evaporated during the transient period of industrial prosperity which followed upon the Armistice and failed to react to the stimulus of depression.

¹ Cmd 9219 (1918)

A life even more brief was the portion of Departments such as that which was created to deal with grants under the Civil Liabilities scheme, or the Dollar Securities Branch of the National Debt Office, the Trading with the Enemy Department of the Public Trustee Office, the Belgian Refugees Committee (attached to the Local Government Board), and the Commission Internationale de Ravitaillement which was set up to co-ordinate the purchases of munitions, equipment, and food supplies on behalf of the allied Governments.

Brought into being, some by the stern exigencies of the war, some by the zeal of benevolent theorists, screened by votes of credit from a minute investigation of expenditure, staffed partly by patriotic volunteers and in even larger proportion by highly paid amateurs, these war-time Departments flourished awhile and have been gradually dispersed. Other Departments set up during the war have survived it, and to these survivors we now pass.

Of these new Ministries the largest is the Ministry of Pensions. This Department is responsible for a larger expenditure of public money than any other Department of State. It was established by the Ministry of Pensions Act, 1916, in pursuance of which an Order-in-Council was issued transferring to the Minister of Pensions, as from the 15th February 1917, the powers and duties of the Admiralty, the Chelsea Commissioners, and the War Office in regard to the administration of pensions to officers, nurses, and men, in respect of disablement, and to their widows, children, and other dependants, in respect of death. The same Act provided that the powers and duties of the Statutory Committee of the Royal Patriotic Fund Corporation should be exercised under the control of and in accordance with the instructions of the Minister of Pensions. By the Naval and Military War Pensions, &c., (Transfer of Powers) Act, 1917, this Statutory Committee was dissolved and its powers and duties were transferred in part to the Minister of Pensions and in part to a new

Ministry
of
Pensions

Committee to be appointed by the Minister of Pensions and to be called the Special Grants Committee. Chief amongst the functions so transferred to the Minister of Pensions was the duty of making provision for medical treatment and for training. In 1919, however, it was decided to transfer the responsibility for training to the Minister of Labour, except in so far as it was deemed necessary to provide training in conjunction with treatment under medical supervision. The powers and duties of the Minister of Pensions were further limited by the War Pensions Act of 1920, which provided for the transfer or the re-transfer to the Service Departments of matters in connexion with compensation for disablement in times

From that date the two main functions of the Ministry of Pensions have been (a) the award and payment of compensation in respect of disablement or death arising as a result of service in the Great War or in any former war, and (b) the provision of medical and surgical treatment for disabilities so incurred.

The organization of the Department is threefold viz Local, Regional, and Head-quarters. The Local Organization consists of Area Offices which afford facilities for pensioners, their widows and dependants, and other claimants to obtain advice and assistance on all matters relating to Great War pensions. All claims on pension matters are lodged, in the first instance, at the Local Area Offices. The Local Offices also arrange for the medical boarding of pensioners for pension or treatment purposes and pay Treatment Allowances.

The area of the United Kingdom and Ireland was formerly divided into eleven Regions, each with separate head-quarters, but in consequence of the diminution of work some of the Regions have been amalgamated, and abolished. At the present moment there are separate Regional Offices for Scotland (Edinburgh), Northern Region (Newcastle-on-Tyne), North-Western Region (Manchester), Midlands Region (Birmingham), and the

Welsh Region (Cardiff) The whole of the south-east and south-west of England (roughly south of a line from the Wash to the Bristol Channel), and Ireland, function directly under Head-quarters. It is probable that in the near future other Regions will be abolished. The functions of a Region are the awarding of pension and the control of Area Offices, but cases of exceptional difficulty or of particular types are submitted to Head-quarters in order that proper co-ordination may be secured.

The Head-quarters consists of the General Administration Division under the Permanent Secretary, the Awards, Accounts, Local Administration, Medical Divisions, and Pension Issue Office.

Medical treatment (in-patients and out-patients) is provided at Ministry Hospitals and Clinics, and concurrent treatment and training at Ministry Centres under the direct control of the Medical Services Division at Head-quarters. Use is also made of Civil Hospitals and other Institutions for the treatment of the Ministry's patients.

The General Administration Division initiates and directs policy, and is responsible for the financial control of the operations of the Ministry.

The Pension Issue Office, as its name implies, issues pensions to men, their widows and dependants, except in Scotland, which has its separate office. It administers the pensions and allowances of lunatic, blind, paraplegic, and other chronic Institutional cases, it also administers the estates of deceased pensioners and authorises the payments abroad to pensioners who emigrate. Payments of pensions are made in cash by the Post Office on the authority of an Allowance Book, issued by the Pension Issue Office, and on presentation of an Identity Certificate which is issued direct to the pensioner.

The Ministry has the assistance of certain consultative and advisory bodies. The Central Advisory Committee was set up in accordance with Section 3 of the War Pensions Act, 1921, to consider such matters as may be submitted for its advice. The Committee includes officers

of the Ministry, ex-service men, and representatives of War Pensions Committees

Local Advisory Councils have also been set up which form the channel for the consideration of the recommendations of War Pensions Committees on matters of policy and administration. These Councils include representatives of ex-service officers or men, widows and dependants, and other suitable persons.

War Pensions Committees, of which there are 170, have been established under Section 1 of the War Pensions Act, 1921, and include representatives of disabled men, widows, and dependants in receipt of pensions, local authorities within the Committee's area, employers and workmen in industry, and voluntary associations.

The functions of Committees, which are advisory and not executive, are (1) to make recommendations upon general matters of policy and administration, upon applications made by ex-service men, &c, for various grants, and upon complaints made by pensioners or claimants, (2) to arrange for the care of motherless or neglected children, the distribution of certain grants made by the Special Grants Committee, and to make inquiries in cases of forfeiture of widows' pensions.

Finally, a Standing Joint Committee, composed of nine Government representatives appointed from the Admiralty, the War Office, the Air Ministry, the Ministry of Labour, and the Ministry of Pensions, and fifteen representatives of ex-service organizations, was constituted in 1920 with the object of assisting organizations of ex-officers and men in their task of securing for their members and ex-service men generally full information as to the rights and privileges conferred on them by the Crown and Parliament, and the enjoyment of such rights and privileges and also to provide machinery for consultation between the Government and ex-service officers and men upon questions affecting them and their dependants. The work of the Joint Committee is carried on through two panels, one confining its attention to matters affecting

ex-officers and the other to matters affecting other ranks. Questions affecting both sections are dealt with at joint sittings.¹

The magnitude of the work entrusted to the Ministry of Pensions may be gauged from the fact that it employs a staff of about 18,000 persons and is responsible for an expenditure of no less than £66,000,000.² Both figures may, however, be expected to show reasonably rapid diminution. In 1920-1, which was the peak year, the staff numbered 32,045 and the expenditure was over £106,000,000. The present number of beneficiaries is about 2,200,000, and the capital value of War Pensions liabilities is about £900,000,000 as compared with about £1,400,000 in 1921.

Should peace be preserved the work of this Ministry will be subject to contraction at an ever accelerated pace, and the Ministry itself should, within a generation, be extinguished.

A similar fate is not likely to overtake the Ministry of Labour, which represents, though less directly than the Ministry of Pensions, a legacy of war-time conditions. The Ministry of Labour was constituted as a separate Department under the New Ministries Act of 1916, primarily to take over and carry on the work of the Labour Department of the Board of Trade. The Ministry is mainly concerned with unemployment and the administration of the Unemployment Insurance Acts. Consequently the numbers of its staff and the amount of its expenditure exhibit extraordinary fluctuations. The net cost of the Employment Department of the Board of Trade in 1913-14 was under £1,000,000,³ and its staff was 4,400. The staff of the new Ministry, which at the time of the Armistice numbered 8,484, had expanded by 1 April 1919 to 25,777. During the trade boom which followed it was reduced to 15,863 (1 October 1920), but six months later was up again to 24,354, and on 1 July 1921 was

The
Ministry
of Labour

¹ Report of Select Committee on Estimates (127, 142 of 1925)

² In 1925

³ H. of C., *Papers*, 70 of 1922, p. 86

31,426 Similarly the expenditure, which in 1916-17 was under 2½ millions, had increased tenfold in 1918-19, and in the following year (1919-20) reached the appalling total of £48,833,235. The expenditure is now (1925) about £18,000,000 and the staff about 15,000. Of these some 10,000 are employed locally in connexion with the Employment (or Labour) Exchanges, and the administration of the Unemployment Insurance Acts, while the keeping of the records for the same service necessitates a Head-quarter's staff of over 3,000. Apart from services connected with unemployment the Ministry supervises the work of the Trade Boards, which regulate wages in unorganized industries, it endeavours, through its Industrial Relations Department, to avert, and by the machinery of the Industrial Court and by arbitration under the Conciliation Act (1896) to settle, Trade Disputes. It has also a variety of duties in connexion with ex-service men. It has taken over from the Pensions Ministry the industrial training of the disabled, it supervises the working of the 'Interrupted Apprenticeship' scheme, and administers the grants for their resettlement in civil life. These functions may be regarded as temporary. A considerable part of the work of the Department consists in the collection and dissemination of Labour statistics, the value of which is variously estimated. Finally, the Ministry is responsible for the British share (9.40 per cent.) of the cost of maintaining the International Labour Organization which has been established in connexion with the League of Nations at Geneva.

The
Ministry
of Trans-
port

The Ministry of Transport owes its legal creation to a Statute of 1919,¹ under which His Majesty was empowered to appoint a Minister of Transport and to transfer to him certain powers in relation to railways, light railways, tramways, canals, waterways, and inland navigations, roads, bridges, ferries, and vehicles and traffic thereon, harbours, docks, and piers. The Minister and his Parliamentary Secretary were declared capable of

¹ 9 & 10 Geo. V, c. 50.

sitting in the House of Commons, and provision was made, on an unusually elaborate scale, for an office establishment. Power was also taken to set up various Committees to give advice and assistance to the Minister in connexion with the exercise of his powers and the performance of his duties. The Ministry now (1925) employs a staff of 464 persons and expends something less than £120,000 a year.

Complementary to the Ministry of Transport Act was the Act passed in 1921¹ for the reorganization of the railways. On the outbreak of war the Government had taken over the control of the railways, though the actual management was vested in a small Committee of general managers, whose performance of a most difficult task afforded a model of administrative efficiency. During the period of control which was prolonged until 1921 the Government guaranteed to the Railway Companies their net receipts on the basis of the year 1913. Control being due to terminate on 15 August 1921 many difficult questions, financial and administrative, arose—questions which were further complicated by a serious strike of railway employees in the autumn of 1919. On what terms, if at all, were the railways to be handed back to their proprietors? In certain quarters there was a vociferous demand that the opportunity should be seized to acquire the railways for the State to unify the many existing systems and to nationalize the whole transport service. Others demanded that the State, having compensated the proprietors for the damage inflicted upon their property by the requirements of the country during the war, should simply hand it back to them. But, apart from all other considerations, the attitude of the railway employees rendered that simple course impracticable. By the grant of a series of war bonuses the employees were by 1919 receiving an additional 33s per week per man. The salaries and wages-bill of the principal railway companies had risen from about £47,000,000 in 1913 to about £150,000,000 (1920), the coal cost had risen, in the same

The Rail-
ways Act,
1921

¹ 11 & 12 Geo V, c 55

period, from about £9,000,000 to nearly £24,000,000, while the total net receipts had fallen from £48,395,198 to £7,500,000 (apart from payments from the State)

The legislation of 1919 and 1921 represented a compromise between the views of the State Socialists and those who believed that national interests could be best served by a return to the principle of private enterprise and company control. The Ministry of Transport was set up not to provide transport facilities (save in the last resort), but to regulate and control those who do. The railways were to be grouped into four gigantic systems by a process of summary amalgamation. The interests of the proprietors and the consumers—the traders and passengers—were to be adjusted by a Railways Rates Tribunal—something between a judicial court and a body of arbitrators—which was invested with the power to fix rates and fares, but with due regard to the interests not only of the public but also of the railway proprietors. Questions as to wages and hours of duty, and other conditions of service, were, in default of direct agreement between the railway trade unions and the railway companies, to be referred to a joint Central Wages Board consisting of sixteen persons representative in equal proportions of the employers and the workmen. In default of settlement by this Central Wages Board an appeal was to lie to a National Wages Board, consisting of six representatives appointed by the Companies, six by the Trade Unions, four by the users of the railways, with an independent chairman nominated by the Minister of Labour. Whether the provisions of the Acts of 1919 and 1921 will furnish a final and a satisfactory solution of the many problems which confronted the State, the railway companies, the railway proprietors, and the railway servants, at the conclusion of the war, it is, as yet, too soon to say. One thing may confidently be said that the machinery set up for the adjustment of labour disputes has, in a time of exceptional strain, stood the test with a large measure of success.

Parallel with the problems presented, at the conclusion of the war, by the Transport industry were those presented by the coal mines. Mines and railways had alike been virtually nationalized during the war, and in both industries the employees had tasted the sweets of serving an employer who possessed a purse temporarily bottomless. The end of the war, and the resumption of normal budgeting, after a period of finance simplified by votes of credit, brought the State and the taxpayers, the mine-owners and the miners, face to face with hard economic facts. The public purse being, in fact, far from bottomless, how were the miners to be paid war-time wages without penalizing the consumer and killing the industry?

The work thrown upon the Board of Trade by an attempt to solve these problems appeared to necessitate the creation, if not of a new Ministry, at least of a new department semi-independently represented in Parliament by a Parliamentary Secretary, to be designated 'The Secretary for Mines'.¹ At the same time there was transferred to the Board of Trade and through it to the Secretary for Mines 'all the powers of a Secretary of State under enactments relating to mines and quarries'. The special object of the new Department, as stated in the Mining Industry Act (1920), was to secure 'the most effective development and utilization of the mineral resources of the United Kingdom and the safety and welfare of those engaged in the mining industry'. The Act authorized the Minister to regulate the export of coal and its pit-head price for consumption in the British Isles, and for bunkers, and to regulate both wages and profits. As in the Transport Bill, power was taken to appoint advisory Committees, and Committees were to be set up for each pit (where it was desired by the employees), for each of twenty-six scheduled districts, and for each of the six chief mining areas, Scotland, Ireland, Northumberland, Durham, the Midlands, the Southern and South Wales. This hierarchy of Committees was to be crowned by

¹ 10 & 12 Geo V, c 50

a national Board. The Act was plainly a compromise between the mutually exclusive principles of Private Enterprise, State Socialism, and Syndicalism, and had, therefore, little chance of success.

The rapid fluctuations of fortunes in the coal-mining industry, the alarm justifiably inspired in the Government by the liabilities to which the State was committed by 'the policy of control', the abrupt termination of control in March 1921, the grave crisis which consequently ensued in April 1921, the prolonged and disastrous strike (1 April-4 July)¹—all these things imposed upon the new Department a strain which, though severe, has not actually broken it. Yet those who can regard the legislation of this period with detachment, who can penetrate through 'circumstantialia' to the fundamental principles which are essentially predicated by the setting up of these post-war Ministries and Departments, must needs be apprehensive as to the stability of a structure which has been built not upon the eternal rock of principle but upon the shifting sands of political expediency. Of this structure the two main pillars are the Ministry of Transport and the Department of Mines. Called into being to meet the emergency of the hour, reflecting in their constitution the confused thinking of a period of economic and social confusion, they may well prove, should industry and society ever regain their normal health, to be a hindrance to recovery rather than an incentive to progress and development.

Miscellaneous
Departments of
State

With a number of Departments, purely administrative and executive, and wholly divorced from politics, it seems unnecessary in the present work to deal at length. Some of them, however, supply indispensable cogs in the wheel of Executive Government, and call therefore for passing notice. The more important of them are closely connected with the Treasury. Of these the Inland Revenue Department, which collects direct taxation, amounting to about

¹ The direct cost to the State of this crisis was estimated at £30,000,000, and the loss to the country at £250,000,000.

£450,000,000 at a cost of about 6½ millions, employs a regular staff of about 19,500 persons. The Customs and Excise Department, which collects about £235,000,000 of indirect taxes at a cost of £4,720,000, has a staff of over 11,000. The function of the Paymaster-General, as his name implies, is the converse of those assigned to the Inland Revenue and Customs and Excise Departments. In his name stand all the balances or rather the one concentrated balance resulting from the sum paid into the bank by the Exchequer for the Public Services. By him all the payments authorized by the Treasury are actually made, the Treasury having in turn been authorized to spend the money by the Comptroller and Auditor-General, whose duty it is to make sure that the credit demanded by the Treasury strictly accords with the Parliamentary vote. Thus the cog-wheel of the whole machine is the Comptroller and Auditor-General. Appointed by Letters Patent under the Great Seal his salary is charged on the Consolidated Fund, and he is irremovable—like a judge—except on an address from both Houses of Parliament. His position is, therefore, one of great responsibility and complete independence. His staff numbers about 340 and the expenses of his office amount to about £160,000 a year.¹ Another office of ever-increasing importance is that of the Government Actuary, who has a staff of 86 persons maintained at a cost of about £40,000 a year. The Government Chemist has a staff of 174 persons costing £46,000 a year. The Civil Service Commission, with a staff of 131, spends £62,600 a year, the Forestry Commission, with a staff of 133, spends £300,000, and the Charity Commission, established in 1853 for the better administration of Charitable Trusts, but now relieved by the Board of Education of its control of educational endowments, still maintains a staff of 118 persons at a cost of £43,000 a year. The Public Works Loan Commission has a staff of 66 persons, but its expenses are practically reimbursed by the fees it receives.

¹ For a detailed description of the procedure, and facsimiles of the appropriate documents, see Appendix E.

The
Officers of
the
House
hold

Had this chapter been primarily historical it would have begun, instead of ending, with some reference to the officers of the Household. Pretending only to an analysis of the mechanism of the State as now existing a few sentences must suffice. The great officers of the Household, as Bishop Stubbs observed, 'furnish the King with the first elements of a Ministry of State'¹. The indispensable servants of the Household from Teutonic days were the chamberlain, the steward, the marshal or horse-thegn, and the cup-bearer or butler. The Norman king, in addition to his quasi-State officials, such as the Justiciar, the Treasurer, and the Chancellor, had his Lord Great Chamberlain, Lord High Steward, his Constable, and his Marshal. These offices tended to become hereditary, but the only one in regard to which the tendency has subsisted is that of the Lord Great Chamberlain. That office has been hereditary since the grant of Henry I to the family of the De Veres, Earls of Oxford. The custody of the Palace of Westminster is still in the keeping of this officer, whose duties otherwise are ceremonial.

The Lord Chamberlain, the Lord Steward, and the Master of the Horse are Court officials pure and simple, though they change (as a rule) with the Government. The Treasurer of the Household, the Controller, and the Vice-Chamberlain, though Household officers for all ceremonial purposes, are also members of the Government and act as ministerial Whips. Besides these high and dignified officials the King also has his working officers: his Treasurer and Keeper of the Privy Purse, his State Chamberlain, and his Private Secretary. The last-named office dates only from 1812, when the Prince Regent raised a constitutional storm by appointing a certain Colonel M'Mahon as his Private Secretary. Purists detected in the new appointment not a common-sense arrangement for dealing with the Regent's correspondence, but an insidious attempt to circumvent the constitutional responsibility of the Ministers of the Crown. Was not the

¹ *Constitutional History*, i. 343

Secretary of the State the King's Private Secretary, and was it not his duty, asked one, to wait upon the King? Would not the new official, asked another, necessarily be brought under parliamentary control? Lord Castlereagh and Mr Spence Perceval, on behalf of the Government, attempted to allay these apprehensions. Colonel M'Mahon was, as Castlereagh pointed out, 'incapable of receiving His Royal Highness's commands in the constitutional sense of the words or of carrying them into effect'. Perceval insisted that Colonel M'Mahon was 'incompetent to communicate the pleasure of the Prince Regent in any way that would authorize any subject in the land to attend to it, or to act upon it with official responsibility'. The whole debate, as a modern critic has pointed out, is exceedingly instructive, alike as illustrating the suspicions still lurking in the minds of Constitutionalists against any semblance of 'personal monarchy', and still more, perhaps, as betraying a curious misapprehension on the part of the Commons about the historical evolution of the Secretariat.¹ Colonel M'Mahon was starting under the Prince Regent precisely where Lord Castlereagh's predecessor in title had started under Henry III. From the point of view of the constitutional purist those were right who foresaw for the new official a similar evolution. Politically, there was little ground for apprehension. The doctrine of Constitutional Monarchy and ministerial responsibility was too firmly established to permit the interposition of a personal servant between the Sovereign and his parliamentary Ministers. Yet who can say what might have happened had William IV been succeeded by a sane George III instead of by a Queen instructed in Constitutional theory and trained in Constitutional practice by so accomplished a mentor as Lord Melbourne? Who can say what might still happen in the case of an inexperienced Sovereign in the hands of a Secretary who was at once competent to exert influence and astute enough to conceal it? In fact, the office has been filled by a succession of men who, as far

¹ Grotton, *op cit*, pp 102-3

as the world knows, have played a difficult part with exemplary discretion. Not least confidently may this be affirmed of the man who for twenty years was virtually Secretary to Queen Victoria—the Prince Consort.

There remain to be noticed three of the most historic and the most dignified officials of the central Government: the Lord Chancellor, the Lord Privy Seal, and the Lord President of the Council.

The Lord
Chancel-
lor

The Lord Chancellor, who is invariably a member of the Cabinet, occupies a fourfold position. He presides in the House of Lords, and as Speaker of the House of Lords receives a salary of £4,000 a year, charged upon the vote for the House of Lords Offices. He is the head of the Judiciary, the head of a Department—the Crown Office in Chancery, and the chief legal adviser of the Government. In the last capacity he is assisted by the 'law officers', the Attorney and Solicitor-General. The manifold duties of the Chancellor, judicial, legislative, and administrative, strikingly exemplify the lack of differentiation incidental to the period in which the Chancellor's office had its origin. Of all the great officers of State, that of the Chancellor is the oldest, dating from the reign of Edward the Confessor. The Chancellor (so named from the *cancelli* or the screen behind which the secretaries sat to transact business¹) was the chief of the King's secretaries and chaplains, the 'keeper of the King's conscience', and custodian of the King's Great Seal. He was a prominent member of the King's Council, a baron of the Exchequer, but primarily the head of a secretarial department, the Chancery. His chief rival, the Norman Justiciar, disappeared at the end of Henry III's reign, and thenceforward the Chancellor was indisputably the leading Minister of the Crown, the 'Secretary of State for all departments', at any rate until the sixteenth century. Of his place in the judicial system I propose to speak later.² Down to the reign of Edward III the office was invariably and naturally held by an ecclesiastic, the first lay Chan-

¹ Stubbs, i. 352

² Cf. chapter xxv.

cellor being Robert Bouchier, appointed in 1340. From the sixteenth century the political importance of the office somewhat declined owing to the development of the Secretariat, but the Chancellor still takes precedence next after the Archbishop of Canterbury, and his office remains not merely one of the highest dignity, but of the greatest importance. Apart from his own judicial duties, the Chancellor is responsible for the appointment of judges,¹ magistrates, and counsel learned in the law, he is patron of many of the King's livings, visitor of the King's Hospitals and Colleges, and head of the Crown Office in Chancery whence many important writs still issue, e.g. those for the election of Members of Parliament. It should be added that the Chancellorship is one of the few offices still subject to a religious disability. It cannot be held by a Roman Catholic.

The office of Lord Privy Seal has, since 1884, been merely a sinecure, but it is an historic office still held, with appropriate precedence, by a member of the Cabinet, not infrequently *in commendam* with another office, and sometimes without emolument. Historically the office is interesting, since it played an important part in the development of the principle of ministerial responsibility. It dates back at least as far as the fourteenth century, and may have been intended as a check upon the growing power of the Chancellor. Any way, by the sixteenth century it had become part of the regular administrative routine that 'documents signed by the King's own hand, and countersigned by the Secretary, are sent to the Keeper of the Privy Seal, as instructions for documents to be issued under the Privy Seal, and these again serve as instructions for the Chancellor to issue documents bearing the Great Seal of the Realm. This practice begets a certain Ministerial responsibility for the King's acts'.² But all legal necessity for the use of the Privy Seal was definitely abolished by Statute in 1884.

The Lord
Privy
Seal

¹ The Chancellor appoints Judges of the High Court, Justices of the Peace and County Court judges, but not the Lords Justices of Appeal, nor the Law Lords nor stipendiary magistrates.

² Martland, *Constitutional History of England*, p. 203.

The Lord
President
of the
Council

The Lord President of the Council is another official of the highest dignity, who has been deprived of the most important of his administrative functions by comparatively recent changes recorded in the preceding pages. The conversion of the Committee of Council into a Board of Education in 1899 was the last and most serious blow. The establishment of the Board of Agriculture was another, less recent and less serious. The Lord President is still nominally a member of many phantom Boards, but apart from his position as a member of the Cabinet, in which he invariably sits, his functions have shrunk with the fortunes of the historic Privy Council of which he is the official head. At meetings of the Council he sits invariably on the right hand of the Sovereign.

The Privy
Council

These meetings are frequent, but only in a formal sense are they important. Yet the business there transacted is indispensable to the efficient working of the administrative machine, and the Privy Council Office has a staff of thirty-six persons and spends about £15,000 a year. It is the King-in-Council who issues Proclamations and Executive Orders. It is in the Council that newly appointed Bishops do homage to the King for the temporalities of their Sees, that Ministers take the official oath, kiss the King's hand, and from him receive the insignia of office, in the Council Sheriffs are still 'pricked'. Numberless executive acts still require to be done in Council, and to be attested by the signature of the Clerk. Maitland¹ enumerates six different kinds of powers delegated by Parliament to the Privy Council: the power to lay down general rules, e.g. as to the administration of workhouses, to issue particular commands, e.g. to a recalcitrant local authority, to grant licences, to remit penalties, to order inspection, to order inquisitions, e.g. as to a railway accident. But in the performance of these functions, though the parent Council remains the formal authority, the real and originating authority is vested in one of the numerous daughter departments to which the Council has given birth.

¹ *Op. cit.*, p. 407

The Council now consists of some three hundred and forty persons. Among them are all Cabinet Ministers, present and past ; and other officers of State ; the two Archbishops and the Bishop of London ; a large number of Peers, including practically all those who have held high administrative posts at home and abroad ; a certain number of the highest judges and ex-judges ; a few colonial statesmen, and a large number of persons whom the Sovereign (or his Minister) desires to honour. Except on the demise of the Crown and some ceremonial occasions, only a few members of the Council are summoned, the customary quorum being three.¹ But the Council has a great history behind it, and, should certain imperialist dreams be fulfilled, may have a great future before it.

¹ The Council which met on 7 May 1910 to proclaim the accession of King George V was attended by over 140 persons, among them, according to precedent, being the Lord Mayor and representatives of the City of London.

XXX THE MACHINERY OF GOVERNMENT

The Administrative System *England, Prussia, France, America* *Delegated Legislation*

'The King hath no prerogative but that which the law of the land allows him'—SIR EDWARD COKE

'Everything for the benefit of the King shall be taken largely, as everything against the King shall be taken strictly'—CHIEF JUSTICE HONABLE SIR EDWARD COKE'S CASE

'The individual citizen is in danger of being ground between two millstones. One is the old one of powers and immunities reserved to the Sovereign under cover of which public servants may escape liability. The other is the newer and more oppressive one of powers excluding or curtailing ordinary private rights of redress which have been conferred by Parliament on the officials of various Departments'—SIR FREDERICK POLLOCK

'The action of our Acts of Parliament grows more and more dependent upon subsidiary legislation. More than half our modern Acts are to this extent incomplete statements of law'—C. F. CARR

THE preceding chapter, though unavoidably catalogic in character, may at least have served to convey some idea of the multifarious and miscellaneous duties assumed by or imposed upon the modern State. Yet it can hardly have failed at the same time to suggest certain disquieting questions? Does the existing arrangement of business make for efficiency and economy? Has not the multiplication of departments tended to the overlapping of duties and reduplication of functions? Is the articulation of work between the several departments of Government orderly and scientific? Does it even roughly correspond with a logical delimitation of services? Or is it completely haphazard, the result of piecemeal legislation and unco-ordinated administration? That the creation of new Ministries and Departments has of late years afforded opportunity for the rearrangement of duties on more

The
business
of
Govern-
ment

scientific lines is undeniable, and the preceding chapter has shown that the opportunity has been to some extent redeemed. Thus the Education Office, as now constituted, represents the concentration of functions previously allocated to the Committee of Council for Education, to the Department of Science and Art, and to the Charity Commissioners. Yet the concentration is not complete. The Home Office is still responsible for Reformatory and Industrial Schools, the Ministry of Labour deals with the vocational training of ex-service men, the Treasury administers the grant to Universities and University Colleges, the Ministry of Agriculture also has close relations with Colleges and Universities in regard to agricultural education, the Home Office and the Ministry of Health both touch the life of children of school age, the former under the Employment of Children Act, 1903, and the latter in connexion with Orthopaedic Hospitals and other health services for children. In each of the cases cited there are good, perhaps conclusive, reasons for the allocation of the particular function to a particular Department. But it is not easy to explain why the Board of Education should be responsible for the Victoria and Albert Museum, the Science Museum, and the Geological Museum, and not for the National History Museum at South Kensington.

The articulation of Functions

A question of fundamental importance seems at this point to emerge. Should the articulation of functions be according to the persons and classes to be dealt with, or according to the services to be performed? For example is it better to have one Ministry of Education, another of Health, and a third of Labour, or Ministries respectively for children, for paupers, and for the unemployed? The Machinery of Government Committee, while observing that neither principle could be applied with absolute and exclusive rigidity, pronounced unequivocally in favour of differentiation according to services. 'It is impossible that the specialized service which each Department has to render to the community can be of as high a standard

when its work is at the same time limited to a particular class of persons and extended to every variety of provision for them, as when the Department concentrates itself on the provision of one particular service only, by whomsoever required, and looks beyond the interests of comparatively small classes.' ¹ As to the soundness of this conclusion there would seem to be little doubt. But even if the principle of differentiation by services be generally adopted, some overlapping is inevitable. Nor can the difficulty be overcome save by systematic co-operation between the several Departments of State. Thus the officials of the Ministry of Health cannot do their work efficiently unless, as regards the health of children, they are in constant touch with the officials of the Board of Education. Similarly the Ministry of Labour must be in close correspondence with the Ministry of Pensions in reference to the training of disabled ex-service men. The new Department of Overseas Trade may be regarded primarily as a *liaison* between the Board of Trade and the Foreign Office. The Treasury must be, and is, in touch with every Department.

The Report of the Machinery of Government Committee, to which reference has more than once been made, has received less attention than it deserved. Many of its conclusions can indeed be accepted, if at all, only with large reservations, and none of its recommendations should be adopted without grave and prolonged consideration. Moreover it is important, when considering them, to bear in mind that the Report was issued at a moment (1918) when the exigencies of war had necessitated the adoption of collectivist methods which were applied under circumstances exceptionally favourable to the temporary success of the experiments. No one doubts that given certain conditions collectivism may produce magnificent results. Under normal conditions, and among average men, the mainspring of economic activity is the desire for wealth—using the term wealth in its widest connotation. But under the stress of an emotion more potent than that of

Report
of the
Machinery
of
Government
(Haldane)
Committee

¹ Cd 9230, pp. 7-8.

personal ambition men will work harder for others than they do normally for themselves. Such an emotion is that of patriotism, a danger threatening the Fatherland supplies a stimulus to generous minds stronger than the desire for personal gain. During the war the State was able temporarily to command the services of all men of goodwill in particular the services of great captains of industry, whom in ordinary times no pecuniary reward could have induced to enlist under the banner of industrial bureaucracy. Two other advantages the State possessed during the years of war it had unlimited command of labour and a command of credit and capital which was also temporarily 'unlimited'. Even so, the results, though superb, were attained at a cost which, though not grudged at the moment, is now recognized as having been grossly extravagant, and having imposed upon the nation a burden which can be alleviated only by a century of strenuous labour and persistent self-sacrifice.

At the moment when the Report of the Machinery of Government Committee was prepared, these truths were less self-evident than they are to-day. Consequently it is not remarkable that the Report should be pervaded by a belief in the virtue of State action and State control much more robust than accords with the prevalent disillusionment of to-day. Nevertheless the specific recommendations of the Committee are entitled to respectful consideration.

Special
Commit-
tee of
Canadian
Senate

With this Report may usefully be compared a Report presented in July 1919 to the Senate of Canada by a Special Committee of the Senate appointed 'to consider and report on the possibility of bettering the machinery of Government'.¹ The Canadian Committee had before them not only a Report on the Organization of the Public Service of Canada specially drafted for the Canadian Government in 1912 by Sir George Murray,² but also the

¹ *Journals of the Senate of Canada* (vol. 14), Ottawa, 1919.

² Rt. Hon. Sir G. H. Murray, formerly Chairman of the Board of Inland Revenue, and Permanent Secretary to the Treasury (1903-11).

Report of the Haldane Committee and an important Report of the Select Committee on National Expenditure on the Financial Procedure of the House of Commons¹ On the whole the Canadian Report, though less exhaustive, is more workmanlike and direct than that of the Haldane Committee and notably less infected by the doctrinaire tone which pervades the latter and detracts from its impressiveness. But the two Reports have naturally much in common.

The outstanding feature of the Haldane Report, as already indicated, is the suggestion that the business of the various departments of Government should be distributed as far as possible according to the nature of the service with which they are concerned. Accordingly, it is proposed that the several Departments should deal with I, Finance, II and III, National Defence and External Affairs, IV, Research and Information, V, Production (including Agriculture, Forestry, and Fisheries), Transport, and Commerce, VI, Employment, VII, Supplies, VIII, Education, IX, Health, and X, Justice. In so far as this may be taken to involve a reduction of departments and a simplification of the functions of the State, the suggestion will command general approval, but incipient satisfaction is discounted both by the caution that some of these branches would 'undoubtedly require more than one Minister', and by the general tenor of the Report, which appears to contemplate the intrusion of the State into every corner and cranny of social and industrial activity.

There remains the question as to the relation which should subsist between the Cabinet as the Supreme Executive and the Administrative Departments. The main functions of the Cabinet are defined as (a) the final determination of the policy to be submitted to Parliament, (b) the supreme control of the national executive in accordance with the policy prescribed by Parliament, and (c) the continuous co-ordination and delimitation of

The
Cabinet
and the
Depart-
ments

¹ *Ninth Report of the Session of 1918* Presented 23 Oct. 1918

the activities of the several Departments of State. From this definition it may be inferred that it is contemplated that the Cabinet of the future should approximate more nearly to the War Cabinet¹ than to the older type, that its functions should be supervisory and co-ordinative rather than administrative, and that its members (limited to ten or twelve) should not as a rule act as political chiefs of Departments.

That there is something to be said for this bifurcation of functions is undeniable, and in particular this. That Parliament would be able to fix responsibility for the details of administration upon the individual head of a Department, to drive it home and to visit serious blunders with the appropriate punishment, without displacing the Government as a whole. The Select Committee on National Expenditure made an analogous point when they insisted that parliamentary control over expenditure will become a reality 'only when the House of Commons is free, not merely in theory and under the forms of the Constitution, but in fact and in custom, to vote, when the occasion requires, upon the strict merit of proposed economies uncomplicated by any wider issue.' Collective responsibility for policy is not surely inconsistent with individual responsibility for administration. Yet the idea of a divorce between thought and action, between policy and administration, is to the English mind unquestionably repugnant, and the repugnance was forcibly expressed by the Marquis of Salisbury in the debate to which reference has already been made.

'His [Lord Curzon's] idea of an ideal Cabinet is a number of gentlemen who are not engaged in Departmental work, who sit as judges before whom the various Ministers, or others interested, are called in to plead and to hear decisions by them. That I believe to be a thoroughly bad system. What you want is not to be governed by people who acquire the information they ask for at the moment, but by people who have constant experience in the administration of affairs. Those are, and can

¹ *Supra*, II 81

only be, the Departmental Ministers who are soaked in the work of their Departments. It is not a question of hearing in ten minutes or a quarter of an hour a case put forward by one man, and the contrary case put forward by another man, and then deciding between them. That is not the method which has prevailed in this country, and which ought to prevail. Our system has been that the Ministers who are actually engaged in the conduct of affairs, who have at their command the best talent of any particular subject that the world can provide, who live, and move, and have their being every day in the transaction of a particular subject, should meet together and come to a decision.¹

Nevertheless, it is a question of supreme moment whether the existing machinery of government is of the pattern best adapted to secure efficiency and economy. No prudent man will answer that question dogmatically. Evidently it is a matter for careful consideration. There is nothing sacrosanct in the existing system of Cabinet Government, nor in the present articulation of functions in the permanent Civil Service. The most impressive argument in favour of both is that they exist, and that their existence is the result not of a single act of creation but of a prolonged process of evolution. No one who sat down to devise an administrative system based upon adherence to certain *a priori* principles of government would produce a scheme in precise conformity with that which the English people have gradually evolved. The English system, as already observed, rests fundamentally upon that association of amateur and professional which is the most characteristic feature of English institutions. It has worked reasonably well, it has been copied with a greater or less measure of success by other peoples, but it is neither logical nor scientific and it involves an annual expenditure which can only be described as colossal. The total estimate for the Civil Services for the current year (1925-6) amounts, as already mentioned, to no less than £222,609,000, and to this sum must be added £11,450,635

¹ H. L. *Official Report*, 19 June 1918

for the Revenue Departments in Great Britain (excluding the Post Office, which earns a profit for the State). The question inevitably arises whether the nation is getting value for its money, whether equal efficiency could not be secured at less cost, above all, whether the State has not assumed duties which could, with greater advantage to the community, be left to private initiative. But the answers to such questions lie outside the scope of a work which is primarily analytical, and would carry us into the realm of Politics and Philosophy into which the mere historian may not intrude. It remains, however, in accordance with the plan of this book, to glance briefly at the administrative systems of other typical States.

The
Ancient
World

For obvious reasons little help can be derived from the ancient world towards the solution of the administrative problem in the democratic States of to-day. 'Ancient societies dispensed, for the most part, with a Civil Service altogether, and only a few outstanding communities carried the formation of a permanent governing staff beyond its rudimentary stages'.¹ Among these the most conspicuous were Egypt and Rome. The principle of direct democracy as exemplified in the city-states of Greece obviously afforded little scope to the development of a permanent and professional Civil Service. The maxim 'rule and be ruled in turns' may embody the ideal of democracy, but it does not conduce to continuity of administration, and it is evidently applicable only to small communities, based upon an economic substratum of slavery. In Egypt, on the contrary, there existed, alike under the Pharaohs and the Ptolemies, a highly developed bureaucracy. At the head of the hierarchy stood the Vizier. 'He was "Keeper of Somerset House", the central office in which the Egyptians deposited their wills. As Master of the Rolls he was in charge of the immense Public Records Office. As Lord Chief Justice he presided over a divisional court of professional judges who

¹ M. Cary, 'The Civil Service in Ancient Civilizations', p. 1, *as The Development of the Civil Service*. London, 1922.

heard appeals from the County Courts ' A High Treasurer, who was ' the second greatest official in Pharaoh's service ', presided over the Treasury, which employed ' a large staff, including the bailiffs of the royal estates ' and the ' Keepers of the Privy Purse (which was already distinct from the public chest) ' The business of the Department was to collect ' a large tribute in kind, partly as rent from the Crown Domains, partly in the form of taxes on freeholds ' There was also a Board of Works which ' carried out by means of forced labour the all-important work of embanking and irrigating and a Munitions Ministry for the equipment of the troops A regular Police Force maintained order in Thebes, the capital, and District Officers acted as governors of the various counties These officials combined the functions of our Indian district judges and collectors, and in addition kept up to date the land register, which in Egypt was almost as old as the land itself ' The Pharaonic system thus outlined underwent little change in later ages It survived the loss of Egyptian independence and was remodelled in turn by each new foreign ruler Under the Ptolemies the higher posts in the Civil Service were reserved for Greeks, but otherwise the Ptolemies adopted the same system which had obtained under the Pharaohs

The Egyptian Bureaucracy, though in itself remarkable, was rudimentary As a ruler the Roman combined the genius of the modern Englishman and the modern Prussian In his sense of discipline and belief in method he anticipated the Prussian, in his adaptability to the demands of a wide-stretching Empire, in his tolerant attitude towards subject peoples, and in his readiness to associate them with the governing race in the task of government he has had no equal among the peoples of the world except ourselves Like the British people, the Romans started on their imperial career without the help of anything like a professional bureaucracy ' In the early days of Roman expansion,' as Mr Cary observes, ' the amateur governing aristocracy were so successful that its methods became as

The
Roman
Civil
Service

it were consecrated ' But the growth of the Empire, ' the accumulation of people and wealth in the capital, and the consequent emergence of a grave social problem,' rendered the creation of a professional service inevitable

The Roman Civil Service was the result of a series of ' piecemeal and reluctant reforms ' effected by the Emperor Augustus and his successors, but by the second century A D the framework was practically complete The principal departments correspond very closely with those to which the modern State has grown accustomed Thus the *Treasury* was elaborately organized, and its principal official drew up a yearly budget ' like any modern Chancellor of the Exchequer ' There were two *Secretariats*, one for Greek and another for Latin correspondence A *Local Government Board* audited municipal accounts A *Scholarship Board* financed the education of poor children The *Post Office* existed only for the convenience of the Emperor The *Board of Works* looked after the public buildings of Rome, and a *Metropolitan Water Board* furnished it ' with one of the best water supplies in the world ' The chief function of the *Tiber Conservancy Board* was to maintain the river embankments There was also a *Road Board*, a *Public Libraries Department*, a *Corn Purchase Commission* and a *Corn Distribution Board*, a *Registration Department* for taking the census, a *Public Record Office*, and a Board for the management of the gladiatorial games Not until the rise of modern Prussia did any State rival Rome in the completeness and efficiency of its administrative system ¹

The
Prussian
Bureau-
cracy

Between ancient Rome and modern Prussia there was, however, one striking contrast The whole administrative system of Prussia may be said to have centred in the Department of Education, that Department, save for the Scholarship Board, was conspicuous by its absence in Roman bureaucracy In the remaking of Prussia, after the debacle at Jena, Fichte and Humboldt played a part not less important and not less conspicuous than Stein and

¹ Cary, *op cit.*, pp 12-16.

Hardenberg, than Scharnhorst and Gneisenau. Among the States of the modern world Prussia stands out pre-eminently as the organized State, and to the perfection of its organization three classes of her citizens have in particular contributed—the drill sergeants, the schoolmasters, and the civil servants. Of Prussia, indeed, it may be said, as Aristotle said of Sparta, ‘the system of education and the greater part of the laws are framed with a view to war.’ Nor can it be denied that it is this unity of principle which has given to the fabric of the Prussian State, and through it to the modern German State, its remarkable completeness and consistency. The army system and the educational system are parts of one coherent whole, and the whole has been rendered and kept coherent by the persistent labours of an incomparably skilled bureaucracy.

On parallel lines with the evolution of the Prussian army we can trace the evolution of a civil service (*Beamtenthum*). The suppression by the Great Elector (1640–88) of the local Estates and the gradual substitution of centralized administration for disorganized local autonomy rendered possible, and indeed inevitable, the drastic reforms of Frederick William I (1713–40). The separated territories of the loosely compacted Prussian Kingdom were welded by him into a single domain, and that domain was administered by a single central directory under the personal presidency of the King, whose orders were executed by a staff of civil servants, carefully graded and co-ordinated, almost pitilessly efficient, and taught to owe responsibility to the head of the State alone. This system was, in its fundamentals, preserved intact by Frederick the Great, though he expanded and perfected it in detail, and in particular hooked up the purely domestic civil service with the Departments of Foreign Affairs and War. For all three the thinking was done by a single brain—his own. So long as that brain functioned the machine was extraordinarily efficient. Between 1786 and 1806 the machine collapsed, and after the evidence of its collapse at Jena, Stein and his colleagues were confronted with the

problem of recreating the brain of an efficient civil service, and making the State, in its civil as in its military capacity, independent of dynastic accidents and vicissitudes

The problem was solved by the devoted and co-operative efforts of Hardenberg and Stein, of Scharnhorst and Gneisenau, and not least, as has been said, of Fichte and Humboldt. The Civil Service was reorganized, and, in the century that followed, by sheer continuity of pressure in the daily task of ordinary administration, it drove home the value of technical knowledge and the material benefits of science properly applied. The Prussianization of the Rheinland province acquired in 1815, the creation of the Zollverein, the economic unification of Germany under Prussian hegemony—all this was the work of a wonderfully efficient bureaucracy. Thanks to the work of the *Beamten* Bismarck could afford to wait until his remorseless diplomacy compelled his foes to strike the hour for the final denouement. There remained after 1871 the Prussianization of the new German Empire. The instrument employed by Bismarck for this work was the Prussian Civil Service. Thanks to its experience and efficiency the enlightened work of the new national Legislature was translated into administrative fact. The organization and administration of finance, customs, post office, railways, insurance against old age, unemployment, and sickness, bringing home to every man, woman, and child in Germany the idea of the Empire as a beneficent power, and as an omnipresent fact in every aspect of life, was a remarkable triumph of Prussian efficiency.¹ The existing articulation of Government offices in the German Reich corresponds closely with that in other countries. The Chancellor has now become a responsible Parliamentary Minister. The Vice-Chancellor at present presides over the Home Department, and the Minister of Justice is also Minister for the Occupied Territories. Ministries for Foreign Affairs, Finance, Defence, Labour, Posts, Transport, Economics and Food and Agriculture

¹ Marriott and Robertson, *Evolution of Prussia*. Oxford, 1915

complete the list. In no other country have the civil servants been so admirably trained for the performance of their specific duties, nowhere else is so large a proportion of the nation's ability to be found in the public service.¹ The sovereignty of the State machinery is the Prussian equivalent of the English Reign of Law, of that machinery the driving wheel is the Civil Service in Berlin.

The position, functions, and organization of the French Civil Service can be understood by an Englishman only if certain fundamental points of contrast between the political traditions and the governmental genius of the two countries are borne carefully and constantly in mind. The English Civil Service is in the main the creation of Parliament, but Parliament itself marks the final stage in the evolution of representative institutions which were local in origin, to which, in Township, Hundred, and Shire, the people had become habituated long before a central Legislature came into being. The Central Government in England represents, therefore, a concentration of local activities. The converse is true of modern France. Local government is the creation of the State, local officials are appointed by the central government and take their orders from Paris in a way which to an English County Council or Municipal Council would seem intolerable, if not incomprehensible.

The
French
Civil
Service

Even before the Revolution of 1789 the centralizing monarchs had made large inroads upon the local autonomy of the French Provinces. Yet there were many survivals reminiscent of feudal independence. All these were swept away by the Constituent Assembly: the old provinces were abolished, every excrescence disappeared, and France was mapped out into Departments, Arrondissements, Cantons, and Communes. Of Departments there are now 90, of Arrondissements 385, of Cantons 3,019, of Communes about 37,000. At the head of each Department is a Prefect appointed by the Minister of the Interior, removable by and responsible to him. He is, in M. Poincaré's striking

Centrali-
zation in
France

¹ Bryce, *Modern Democracies*, II, 39

phrase, 'a national figure in the midst of local life the organ and emanation of the Government' ¹ He is assisted by a General Secretary and a Consultative Committee also appointed by the Government, while the democratic element is supplied by a General Council to which each Canton sends one representative elected by universal suffrage The Prefect is shorn of some of the powers which he exercised under Napoleon, but to English eyes his powers are almost dictatorial in matters of patronage, police, poor relief, and even education The teachers of the primary schools are appointed by him and by-laws emanate from him The sub-Prefect stands to the Arrondissement in the same relation as the Prefect to the Department, but the Mayor of the Commune, though acting partly as the agent of the Central Government, is elected by and from the Council of the Commune, and to that extent, though with far less independence, corresponds with an English mayor

There is, then, far more of centralization and of direct Government control in France than in England, or even in Germany, a contrast which necessarily affects the work of the members of the central administration

Depart-
mental-
ism

A second point of contrast is the larger measure of Departmentalism in France The multiplication of Departments has necessarily accentuated a similar tendency in England, but Cabinet cohesion is a much stronger force in England than in France, and the closer association of the Parliamentary Chiefs is naturally reflected in the work of the Departments over which they preside A French Minister shoulders a larger share of individual responsibility, and even in its internal organization his Department reflects the relative independence of its chief ²

The
Offices of
the
Central
Govern-
ment

The allocation of business to the chief Departments of Government in France does not differ materially from our own, though it is perhaps, as would be expected, somewhat more logical and scientific The Ministry of Justice is not

¹ R. Poincaré *How France is Governed* p. 61

² *The Development of the Civil Service*, p. 181

infrequently taken by the President of the Council (Prime Minister), though he sometimes combines the Presidency of the Council with another office. If the Prime Minister is not Minister of Justice, the latter Minister acts as Vice-President of the Council. This Minister is the successor of the Chancellor of the *ancien régime*, he is the President of the Council of State (which must be clearly distinguished from the Cabinet Council), the head of the Magistracy, and the Keeper of the Seals of France. He is responsible for the administration of justice, for prisons and reformatories.

The Ministry of the Interior is responsible for public order, police, hospitals, and asylums, and, as we have seen, for the supervision of local government. Deprived by the Ministry of Justice of some of the functions performed by the English Home Office, the Ministry of the Interior carries on much of the work of the Ministry of Health.

The Ministries of Foreign Affairs, Colonies, War, and of Marine perform functions so closely analogous to the corresponding Ministries in England as not to call for special mention.

To the Ministry of Instruction and Fine Arts are assigned functions far transcending in range and importance those of our own Board of Education. It is supreme over every grade of education in France from the Primary School to the University. In its main outlines the educational system of France still bears the impress of the masterful genius of Napoleon. The Minister is the Grand Master of the University. He is assisted by a Council, the majority of its members being elected by the members of the higher teaching profession, a few by the primary teachers, and some being nominated. Eight Directors severally supervise Superior Education (including universities and scientific and learned societies), Secondary, Technical, and Primary Education, Accounts, Records, and Scientific and Industrial Research and Inventions. For University education France is divided into seventeen Academies, at the head of each Academy is a Rector, appointed by the Government. The Rector is the head of

Education

the local University and exercises a general supervision over the superior, secondary, and higher primary education of the district. Secondary education is given in State *lycées* and colleges and in private establishments. Primary instruction is compulsory (from the age of six to sixteen), gratuitous, and secular. Religious congregations are excluded from all share in education, but private schools are permitted.

For the whole of this vast network of education the Minister of Public Instruction is responsible, as well as for the National Schools of Fine Arts and Decorative Arts, the School of Ceramics at Sèvres, and the School of Gobelins' Manufactures. But the Minister of Agriculture is responsible for the various Agricultural, Horticultural, Dairy, Forestry, and Veterinary Colleges, and for the Stud College. The Minister of Commerce is similarly responsible for certain specialized schools and colleges of Art, Crafts, Manufactures, &c., the Minister of Public Works for the National School of Mines and a School of Bridges and Highways, the Minister of the Colonies for a Colonial College, and the Ministers of War and Marine for various Military and Naval Academies.

The Ministry of Public Works is responsible not only for railways, highways, and canals, but for posts and telegraphs, and the Ministry of Labour—a relatively new Department—for all that concerns thrift and social insurance as well as for other matters which formerly fell within the province of the Ministries of the Interior and of Commerce and Industry. The latter Ministry deals with the development of industry and trade, with credit, mutual guarantee associations, and the popular banks, weights and measures, commercial attachés, and similar matters now assigned in England to the Department of Overseas Trade, customs legislation and tariffs, commercial treaties, industrial and commercial combinations, patents, trade marks, registered designs, &c.

Ministry
of
Finance

The Ministry of Finance in a sense combines the functions of the English Treasury, of the Revenue Departments, and of the innumerable local bodies which are in

England responsible for the imposition and collection of local rates. The Minister of Finance prepares the budget ; he controls the State industries and the collection of taxation direct and indirect, and pays the pensions of retired State officials. Financial procedure in France differs, as already indicated, from that which obtains in England, nor are the functions of the respective Finance Ministries very strictly comparable. The contrast between them arises partly from the fundamental difference between the relations which respectively exist between Central and Local Administration in the two countries, partly from the greater independence *inter se* of French Departments, and not least from the fact that the primary business of the French Treasury is the collection of revenue, while the English Treasury, though responsible for the methods proposed for raising revenue, is not less concerned with the control of expenditure. A Chancellor of the Exchequer is engaged in an unceasing struggle with his colleagues in regard to their departmental demands upon the public purse. The sole responsibility for the estimate ultimately presented to the House of Commons rests with him, since it cannot be so laid without his approval. In France, on the other hand, the responsibility for departmental estimates rests upon the Minister concerned, while the responsibility for presenting them to the Chambers rests upon the Budget Commissions of those Chambers. The fight, therefore, rages not between the Treasury and the spending Departments, as with us, but between the latter and the Budget Commission.

The staff of the French Ministry of Finance occupy a special position in the Civil Service. They are appointed by the Minister, half by examination and half by patronage, being in both cases nominated from a list of selected persons as a reward for special services. Once appointed they enjoy complete security of tenure, as they are not liable to dismissal.¹

¹ *The Development of the Civil Service*, pp. 197-202 ; Poincaré, *op cit.*, c. xii.

It results from the severe restriction of the sphere of local self-government, and the consequent imposition of the detailed duties of administration upon the central government, that the Civil Service in France is in proportion to the population larger than that of any other country in Europe or America

**Post-war
Offices** In France, as in England, the war has been responsible for the creation of several new Departments. Of these, the Ministry of Pensions and the Ministry of the Liberated Territories perform functions sufficiently described by their respective titles. There is also a Ministry of Labour, Hygiene, Assistance, and Social Provision, which, in addition to the duties imposed upon the Ministry of Labour in England, undertakes many of those which with us are assigned to the Ministry of Health.

**French
and
English
Ministers** The position of the Political Heads of Departments in France also differs materially from that which they occupy in England. Ministers, though in fact almost invariably members of one or other Legislative Chamber, are not necessarily either Deputies or Senators, nor is the idea of Cabinet solidarity quite so fully developed as in England. For the general policy of the Government all the members of the Cabinet accept responsibility, but for the administration of his own Department each Minister is individually responsible. The distinction is, however, less marked in practice than in theory.

**The
American
Civil
Service** When we pass from France to the United States of America a fundamental distinction must be observed. In the case of France, as of England, we are dealing with the administrative system of a unitary State. By reason of the extreme centralization which since the Napoleonic régime has characterized her policy, France is even more 'unitary' than countries which, like England, possess a vigorous and historic system of Local Government. The Prussian bureaucracy also was devised with reference to a unitary State, though it has been adapted to the needs of a federal State. Germany, however, has never afforded—owing to the predominance of Prussia—

so perfect an example of federalism as the United States of America. This outstanding and differentiating factor must, then, be taken into account in any attempt to analyse Political Institutions in the American Commonwealth. Equally, however, must it be remembered that the federal administration of America is itself highly centralized as compared with that of Germany. In the Reich, though legislation is federal, the administration is decentralized, the laws being executed by local officials appointed by the State Governments. In America it is otherwise, federal law being executed throughout the States by federal officials.

Another difference between America and England or France needs, once more, in this new connexion, to be emphasized. The type of Democracy which prevails in the latter States is parliamentary; in the former it is presidential. A Parliamentary Executive concentrated in a Cabinet necessarily affects the character of departmental organization. France, with a less tenacious grip upon the Cabinet principle than England, has a more departmentalized administrative system than England. The United States which has no Cabinet—properly understood—possesses an entirely departmentalized administration. That the heads of the chief Departments of the Federal Administration have come together in a Cabinet, and that the Cabinet is gradually acquiring more and more cohesion, is true, but, as already observed, the American Executive is essentially non-parliamentary; the Ministers are severally responsible each for his own Department to the President alone.

The creation of Executive Departments is implied, though not in terms enjoined, in more than one article of the Constitution. Thus, by Article II, Sect. II, Cl. 1, the President is authorized to 'require the opinion, in writing, of the principal officer in each of the *executive departments*, upon any subject relating to the duties of their respective offices'. By Article I, Sect. VIII, Cl. 18, Congress is empowered 'to make all laws which shall be necessary or

Depart-
mental-
ism

Growth of
Depart-
ments

proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any *department* or officer thereof'

Accordingly, at its first session in 1789, Congress created three executive departments—the Department of Foreign Affairs (soon to be reorganized as the Department of State), the Department of War, and the Treasury. Shortly afterwards it created the office of Attorney-General which, in 1870, was organized as the Department of Justice. The Department of State, besides the ordinary duties pertaining to a Foreign Office, also has the custody of the Great Seal and promulgates all the laws, executive orders, and proclamations, as well as treaties. The Secretary of State occupies by custom a premier position in the President's Cabinet, though legally he is precisely on a par with his colleagues, and the Department over which he presides is actually the smallest of the executive departments. The ambassadors and all the other diplomatic officials, as far down as the Secretaries of Legation, are appointed not by the Secretary of State but by the President. The service is not a professional one, nor in its higher ranges permanent. The higher officials are changed with every change of party and generally with every administration, if not oftener.

The War Department stands in a special relation to the President, who is Commander-in-Chief of the Army, and is therefore authorized to make regulations independently of Congress. In addition to the management of military affairs the War Department is responsible for the construction of public works, the improvement of rivers and harbours, and also for the administration of the overseas possessions of the Republic. Herein it follows the analogy of the English War Office which, until the Crimean War, was responsible also for the Colonies.

The Treasury is, with the exception of the Post Office, the largest of the Government Departments, having a staff of no fewer than 30,000 persons. Its primary function is

the collection of the federal revenue which mainly comes from three sources—customs duties, internal revenue taxes (notably excise), and income tax. It also controls the mint and the currency and the banking system, being invested with a power of inspection over the national banks quite alien from English usage. The Comptroller of the Currency and the Director of the Mint are officials of the Treasury, though the former, if not the latter, occupies a semi-independent position. The Treasury does not prepare a budget, since in America there is no executive budget, but it prescribes the form of public accounts. It supervises the land banks and the operation of the Federal Farm Loan Act. Besides these financial functions the Treasury is responsible for the planning, though not the execution, of public works, for the coast guard, and, somewhat anomalously, for the Public Health Service.

The Department of Justice represents an expansion of the office of Attorney-General, which was created in 1789. The Attorney is the legal adviser of the President and of the administration; he is also the chief advocate and chief prosecuting officer. He has no official voice in the selection of the judges, but he controls the assistant attorneys and district attorneys and the United States marshals, who are the executive officers of the Federal Courts. He also advises the President in the exercise of the prerogative of mercy. The national prisons are under the control of this Department.

The Post Office, as a separate Department, dates from 1829, and now employs no fewer than 300,000 persons. Its functions call for no special enumeration, being practically identical with those of the English Post Office, with the important difference that it was not, until the world-war, regarded as a revenue department. Rarely, indeed, before 1917, did receipts balance expenses. Like the Secretary of the Treasury, but unlike other Ministers, the Postmaster-General reports directly to Congress.

The Department of the Navy is not charged with any extraneous duties, but the Department of the Interior

occupies a peculiar position. Few if any of the duties performed by the English Home Office are discharged by it, but it is responsible for Patents and Pensions, for educational statistics and information (education itself being a State not a federal service), and for the native Indians. It also acts as the Land Office, and looks after the classification survey, the sale of public land, and irrigation works.

The Department of Agriculture as an Executive Department of Cabinet rank dates only from 1888. It acts as the meteorological office, carries on investigations into plant life, soils, insect pests, diseases of animals, &c., it inspects live stock, meat, and butter, and controls animal quarantine, it administers the Food and Drugs Act (1906), it publishes crop estimates and agricultural statistics, and information concerning the marketing of products, it conducts a Biological Survey and an Office of Farm Management, it looks after the Agricultural College and experimental stations, it administers the federal road Act, and acts as a Forestry Commission.

The Department of Commerce and Labour was created in 1903, and from it ten years later the Department of Labour was separated. The parent Department remains responsible for the encouragement of home and foreign trade, for lighthouses, navigation, the mercantile marine, steamboat inspection, for the geodetic survey, and for fisheries. The Department of Labour deals with immigration, naturalization, industrial disputes, statistics, and child-welfare.

Excluding the military and naval service, the employees of the national Government numbered, prior to the world-war, no fewer than 500,000. How is this great service recruited and on what terms do they serve the State?

The
'Spoils'
System

Down to the year 1883 the American Civil Service was a byword for incompetence and corruption. Employment under the State was the reward of services rendered to the victorious political party. To thirty-six offices the

President personally nominates, over 10,000 appointments are made by him with the advice and consent of the Senate, the rest are made by the heads of departments or their subordinates. This 'spoils system' was initiated by Jefferson in 1800 and was firmly established under his successors. It derived some sanction from the democratic principles of 'rotation' and equality, but was frankly defended on the ground that the spoils of victory properly belong to the victors. Various attempts were made to reform a system which degraded politics, impaired the efficiency of public administration, absorbed the energies of public men, corrupted the sources of public life, which excited the contemptuous amusement of America's enemies, and made her friends ashamed. Almost every American of repute outside politics condemned the system.

No real improvement was effected until after the passing of the Civil Service Reform Act of 1883. Writing soon after the passing of that Act Mr (afterwards Viscount) Bryce said 'If this Act is honestly administered, and its principle extended to other federal offices, if States and cities follow, as a few have done, in the wake of the National Government, the spoils system may before long be rooted out.'¹

When, more than a generation afterwards, Bryce gave to the world his *Modern Democracies*, he could note with satisfaction that, though traces of the old Adam still survived, an immense improvement had been effected. More than half the posts under the Federal Government have been 'taken out of politics', the appointments to them are made by open competitive examination and the civil servants enjoy fixity of tenure. This applies to most of the higher and a very large number of the inferior posts in the State Departments at Washington, to postmasters and to customs-house officials. By the year 1916 the 'classified service' (i.e. the service recruited by competitive examination) included no fewer than 296,000 posts out of approximately 480,000. To offices filled on the nomina-

¹ *American Commonwealth*, II 713

tion of the President after confirmation by the Senate the Reform Acts do not apply. There is, therefore, a very large field—roughly 200,000 posts—open to political patronage. Even in the classified service the results of the new system have not quite justified expectations. A Civil Service Commission of three members assists the President in making regulations for the service, and conducts the competitive examination, but the Act of 1883 provided that the examinations should be 'practical in their character—and so far as may be shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service in which they seek to be appointed.'

This is the exact opposite of the principle adopted in England where the examinations are designed to test general ability. The result, in the judgement of a highly competent American critic,¹ is that the English service attracts a more highly educated class of men, who, though innocent of all technical training, quickly develop into valuable officials.

'In the United States', the same writer proceeds, 'the examinations, except for the positions requiring scientific or technical knowledge, in general require not much more than the ordinary high school education, together with some practical efficiency. As a result, the candidates do not have the education and general ability of the English officials and are frequently men of less capacity than are found in private enterprises.'

Superannuation
and
Pensions

In another respect the American regulations work less satisfactorily than the English. There is no provision in America for pensionable superannuation. Consequently, though the present system is barely forty years old, the Civil Service is already clogged with employees who ought to be retired. The President and the Heads of Departments have the power of removal even in the 'classified' service when removal is demanded in the interests of

¹ Dr Everett Kimball, *The National Government of the United States* (Boston, 1920), p. 229. To this admirable work the preceding paragraphs owe much.

efficiency But the absence of pensions naturally deters them from the exercise of the power save in flagrant cases Nevertheless, no one who is in a position to compare the American Civil Service of to-day with the Service of forty years ago can fail to appreciate the improvement which has been effected

A survey, however brief, of the Administrative systems of England, Germany, France, and the United States inevitably raises many detailed questions as to the most convenient distribution of functions between various departments, as to the best system of recruitment, as to tenure, and so forth Upon these questions preceding paragraphs have touched There remains, however, a more fundamental question which demands consideration before this chapter can close Few problems in Political Science have been discussed with greater amplitude than the problem as to the proper relation between the Legislature and the Political Executive Little attention, on the other hand, has been paid to the question as to proper form of legislation and the relation which should subsist between the work of the Legislature and that of the Permanent administration The relations between the Executive and the Judiciary will be more conveniently considered in a later chapter

Problems as to proper form and contents of Statutes, and in particular as to the amount of detail into which it is desirable for the governing Legislature to go, and conversely the amount of discretion which may with propriety be left to administrative bodies, have lately received increased attention from publicists It has been a commonplace of criticism that in this matter a sharp contrast is to be drawn between England and the United States on the one hand, and, on the other, States like France and Germany where it has been customary in legislation to leave a great deal to the discretion of the administration France and America may, perhaps, be taken as the extreme examples of the contrasted methods of legislation

Delegated
Legisla-
tion

n United
States

The United States, as we have already in more than one connexion observed, adheres tenaciously to Montesquieu's doctrine of the Separation of Powers. The spheres of the Legislature, the Executive, and the Judiciary must be kept, as far as possible, absolutely distinct. Consequently it is customary for legislation to go into minute detail, leaving a minimum of discretion as to the application of statutory enactments to the administrative authorities. Yet such discretion, as Professor Willoughby has pointed out, must needs be given to these authorities (1) to determine when and how powers conferred are to be exercised, and (2) to establish administrative rules and regulations, binding both upon their subordinates and the public, fixing in detail the manner in which the requirements of the statutes are to be met and the rights therein created are to be enjoyed.¹ The proper limits of delegation have frequently been defined by the American courts. Thus in the case of *Field v. Clark* the Court held 'The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done, to the latter no valid objection can be made.' In another case the Court went even farther, insisting that 'a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or state of things upon which the enforcement of its enactment depends, would be "to stop the wheels of Government" and to bring about confusion, if not paralysis, in the conduct of public business'.² These judgements may seem to labour a commonplace, yet the commonplace, and the supposed necessity to emphasize it, are indicative of the extreme jealousy with which the average American regards any attempt on the part of the Executive to intrude upon the sphere of the Legislature, and any disposition on the part of the Legislature, in

¹ *The Constitutional Law of the United States*, II 1318, *op. cit.* Kimball, *op. cit.*, p. 233

² Kimball, *op. cit.*, pp. 232-4

heedlessness or laziness or under pressure of business, to delegate quasi-legislative authority to the Executive

No such apprehension is entertained in France. On the contrary it is common form for the French Legislature to enact statistics in the most general terms and to impose upon the Administration—the President, the Ministers, the Prefects, and even the Mayors—the duty of issuing ordinances to carry out in detail the general intentions of the Legislature. The German practice approximates to that of France. In France

England now stands, in this matter, midway between France and the United States. In former days Englishmen were said to be distinguished from their continental neighbours by their 'instinctive scepticism about bureaucratic wisdom'. Consequently Parliament attempted, in making laws, to provide beforehand, by precise statutory enactment, for every contingency which might reasonably be expected to arise. This naturally rendered the form of English statutes exceptionally elaborate and detailed. Of late years, however, Parliament has shown a marked tendency to abandon this tradition. In our legislative forms we have moved towards continental methods. Partly owing to the increasing complexity of industrial and social conditions, partly under the subtle influence of Fabian Socialism, partly from the general abandonment of the principle of *laissez-faire* and the growing demand for governmental guidance and control in all the affairs of life, partly from sheer despair of the possibility of coping with the insistent cry for legislation, Parliament has manifested a disposition to leave more and more discretion to the administrative departments. Many modern statutes are mere *cadres*, giving no adequate indication of their ultimate scope. They lay down general rules and leave it to the Departments concerned to give substance to the legislative skeleton by the issue of Administrative Orders. This tendency has been noted not only by English publicists like the late Sir Courtenay Ilbert,¹ who, as Clerk In England

¹ Cf. *Legislative Methods and Forms*, pp. 220-4

of the House of Commons, had exceptional opportunities for close observation of the form of legislation, but by more detached critics of English institutions like President Lowell of Harvard. The latter, after a reference to the 'growing practice of delegating legislative power', adds

'We hear much talk about the need for the devolution of the Power of Parliament on subordinate representative bodies, but the tendency is not mainly in that direction. The real delegation has been in favour of the administrative Departments of the Central Government, and this involves a striking departure from Anglo-Saxon traditions with a distinct approach to the practice of continental countries'.¹

Parliament
and the
Public
Depart-
ments

That Dr Lowell is substantially accurate in his diagnosis is not open to question, though he may, perhaps, underrate the extent to which Parliament has devolved quasi-legislative powers upon local authorities whose function is primarily administrative. This point will demand attention in a later chapter. Nor is this the appropriate place to deal with the disquieting features of recent relations between the Executive and the Judiciary. We must for the moment concern ourselves only with the tendency, increasingly manifest in recent years, to confer upon Public Departments the functions appropriate to subordinate legislative bodies. 'This is not merely', as a shrewd critic has observed, 'part of the *damnosa hereditas* of the war, the bureaucratic tendency was developing long before 1914, but five years of emergency government have brought it to a pitch which is fast becoming intolerable. It is idle to boast of the glories of our Constitution when the fountain of justice is polluted by the owner of the soil'.²

Proclamations

The action of the Executive in recent times might seem to have revived controversies which jurists had complacently assumed to have been finally settled by the constitutional contests of the seventeenth century. Mr Dicey, in his classical work on the *Law of the Constitution*,

¹ *Government of England*, 1, pp. 363 seq.

C. K. Allen, *Quarterly Review*, No. 477, p. 259.

claimed as a characteristic feature of the English Constitution the absence of any legislative authority which could compete with the exclusive prerogative of Parliament.¹ In earlier days there did indeed exist, side by side with Parliament, a system of royal legislation under the form of Ordinances,² and (under the Tudors) of Proclamations. Constitutional historians have been wont to illustrate the dictatorial character of Henry VIII's administration by reference to the famous Statute of 1539 which formally empowered the Crown to legislate by means of Proclamations. That enactment marked, as Mr Dicey observes, 'the highest point of legal authority ever reached by the Crown', yet even that Act contained a limiting clause excluding from the ambit of legalized proclamations anything which could be 'prejudicial to any person's inheritance, offices, liberties, goods, chattels, or life'. The Statute of 31 Henry VIII, c. 8, was repealed in the reign of Edward VI, and Queen Elizabeth employed Proclamations, in a perfectly constitutional manner, as a means of enjoining obedience to the law—chiefly in ecclesiastical matters.

James I, in this as in other matters, perverted the legitimate prerogative of the Crown to more questionable uses. Consequently, in 1610, his 'most humble Commons perceiving their common and ancient right and liberty to be much declined and infringed in these late years deemed that the time had come to demand justice and due redress'. They pointed out that

'amongst many other points of happiness and freedom previously enjoyed by Englishmen there is none which they have accounted more dear and precious than this, to be guided and governed by certain rule of law, which giveth both to the head and members that which of right belongeth to them, and not by any uncertain or arbitrary form of Government'. Nevertheless it is apparent, both that proclamations have been of late years much more frequent than heretofore, and that they are extended not only to the liberty, but also to the goods, inheritances, and livelihood of men, some of them tending to alter some points of the law and make them new, other some

¹ 2nd ed., p. 47

² *Ibid.*, p. 48

made shortly after a session of Parliament, for matter directly rejected in the same session others appointing punishments to be inflicted before lawful trial and conviction some containing penalties in form of penal statutes some referring the punishment of offenders to the courts of arbitrary discretion, which have laid heavy and grievous censures upon the delinquents and some vouching former proclamations, to countenance and warrant the latter By reason whereof there is a general fear conceived and spread amongst your Majesty's people, that proclamations will by degrees grow up and increase to the strength and nature of laws whereby, not only that ancient happiness, freedom, will be much blemished if not quite taken away, which their ancestors have so long enjoyed, but the same may also in process of time bring a new form of arbitrary government upon the realm'

The Commons, therefore, humbly besought the King that no pains or penalties might be imposed upon his subjects *unless they shall offend against some law or statute of this realm in force at the time of their offence committed*¹

Coke, being appealed to in reference to the legality of certain Proclamations, begged leave to be allowed to consult other judges, with the result that he and three of his colleagues delivered, in the presence of the Privy Council, an opinion of historic significance

'The King', they declared, 'cannot by his proclamation create any offence which was not an offence before, for then he may alter the law of the land by his proclamation in a high point The King hath no prerogative but that which the law of the land allows him But the King may by proclamation admonish his subjects that they keep the laws and do not offend them'

The soundness of the doctrine thus enunciated has never since been formally questioned, but recent tendencies in legislation and administration render it imperative to inquire whether serious encroachments upon the spirit of the Constitution have not been committed and to some extent condoned It may, indeed, be argued that conditions have been changed by the advent of Constitutional

¹ Petyt, *Jus Parliamentarium*, pp 319-20

Monarchy Admittedly the Prerogative of the Crown is now exercised by an Executive responsible to Parliament. Nevertheless, it is far from certain that the liberties of the subject are not in process of being gravely infringed by the methods of legislation which have, in recent years, become increasingly fashionable.

The Administrative Departments and the Privy Council have virtually been erected, though admittedly by the action of the supreme Legislature, into subordinate legislative bodies. Such bodies may be and have been used in a variety of ways: (i) to effect the direct amendment of a Statute, (ii) to create legislative machinery, and (iii) to enact supplementary legislation. Examples of these methods are given in an exceedingly suggestive essay by Mr C. T. Carr,¹ who has observed that the action of Acts of Parliament ever grows more and more dependent upon subsidiary legislation. 'More than half our modern Acts', he writes, 'are to this extent incomplete statements of law'. Thus out of 102 Public Acts passed in the year 1919 no fewer than 60 delegated legislative power to some subordinate authority. Illustrations of the power directly to amend Statutes passed by Parliament may be found in an Act of 1897 which empowered the Secretary of State to alter the table of fees prescribed in the Metropolitan Police Act of 1839, and again in the Companies Act of 1908, which empowered the Board of Trade to vary the tables and add to the forms in the schedules.

Subordinate legislation

Again, it is frequently found convenient to give to an Administrative Department authority to create legislative machinery, as, for instance, in regard to the commencement, duration, or application of an Act. Thus 'the appointed day clause' is particularly useful in Acts which are designed to effect Constitutional changes, such as the British North America Act of 1867, the Australian Commonwealth Act of 1900, the Government of India Act of 1919, and the Government of Ireland Act 1920, or Acts which, like the Local Government Acts of 1888 and 1894,

¹ *Delegated Legislation*

involve administrative changes. Similarly the power is used to authorize the application or extension of an Act, as in the *Trade Boards Act* of 1918, where the Minister of Labour is authorized to apply the Act, by Special Order, to trades other than those affected by the original Act of 1909. The result has been that the Act which was applied by Statute to four trades and by Provisional Orders to four more has now been applied by the Minister of Labour to no fewer than thirty trades.

Finally, the device of delegation is employed to enable a subordinate body to make rules, regulations, and orders which elaborate, supplement, or help to work out some principle which Parliament has laid down. A conspicuous illustration of this use of delegation is to be found in the *Aliens Restriction Amendment Act* of 1919 which extended and prolonged certain powers conferred upon the King-in-Council by the *Aliens Restriction Act* 1914, and in particular empowered His Majesty-in-Council to repeal the *Aliens Act* of 1905 and to incorporate any of its provisions in an Order-in-Council. Under the powers thus conferred His Majesty made an Order, dated 25 March 1920, which in form, length, and elaboration is not distinguishable from an Act of Parliament.¹ This Order, in addition, contains no fewer than twenty-six articles, arranged in three parts, dealing with the admission, supervision, and deportation of aliens. This delegation indeed constitutes, as Mr Carr justly observes, 'a remarkable surrender' on the part of Parliament. Less conspicuous, but still very significant, examples may also be found in the power conferred upon His Majesty-in-Council to make provision for various matters under the *Representation of the People Acts* (1918 to 1922),² or, under the *Municipal Corporations Acts* of 1882 and 1893, to alter the number and wards of a Borough.³

Essential
conditions
of
Delegation

That such delegation of quasi-legislative functions is convenient, legitimate, nay, under modern conditions inevitable, is not denied. But the device may obviously

¹ See Appendix B

- Cf. Order-in-Council of 25 June 1925

² For specimens of different types of Orders-in-Council, see Appendix B

lend itself to grave abuse unless the employment is strictly circumscribed and carefully safeguarded. It is clearly, in the first place, essential that the authority to which the power is delegated should be in the most literal sense trustworthy. Then it is desirable that if particular interests are to be affected, representatives of these interests should be consulted, and it is indispensable that in every case the limits of the delegated authority should be defined. In the famous *Zamora* case, in 1916, the Privy Council was impelled to 'give the Executive a rude reminder that the Crown cannot alter the law of the land by Order in Council'¹—unless, indeed, such power is specifically delegated by Statute. Above all, it would be in the highest degree dangerous to confer upon subordinate bodies delegated powers of legislation unless the Courts can be absolutely relied upon to interpret the law as between the Crown and the subject with complete impartiality and independence. The warning recently uttered by Lord Shaw of Dunfermline was, in this connexion, far from superfluous. 'The increasing crush of legislative efforts and the convenience to the Executive of a refuge to the device of Orders in Council would increase that danger [of a transition to arbitrary government] tenfold were the Judiciary to approach any action of the Government in a spirit of compliance rather than of independent scrutiny.' That is palpably true, but the powers of the Judicature may be and are circumscribed.

'The Courts,' as Mr Allen has justly observed, 'though instinctively hostile to officialism, are powerless to curtail prerogatives definitely granted by Statute to subordinate authorities. The most they can do is to say, in appropriate cases, that powers arrogated by officials are *ultra vires* the Statute under which they are claimed. And this is not easy when, as often happens, the authorizing statute is hastily drafted and loose in its terms.'²

Nevertheless, it is plain that the rapid increase in the volume and complexity of legislation, and the ever-grow-

¹ Allen, *op cit*, p. 251

² *Op cit*, p. 249

ing demand for an extension of the functions of the State, do lay an additional responsibility upon the Courts, and render the independence of the Judicature more than ever essential to the liberty of the individual and the well-being of the community.

To the position of the Judiciary in the modern State the following chapters will therefore be devoted:

BOOK VI
THE JUDICIARY

XXXI OF THE JUDICIARY (1)

The Judges and the Law *The Problem of Personal Liberty*

Die parlamentarische Regierung Englands ist eine Regierung nach Gesetzen und durch Gesetze'—RUDOLPH VON GNEIST

'The legal spirit pervading the [English] system is the result of giving to public law the sacredness and inflexibility that pertains to private law, and this end is reached by fusing the two together and confiding them both in the last resort to the same Courts'—A. L. LOWELL

'That after the limitations shall take effect as aforesaid judges' commissions be made *quandiu se bene gesserint* and their salaries ascertained and established, but upon the address of both Houses of Parliament it may be lawful to remove them'—*Act of Settlement*, § 7, A. D. 1700

WITH rare unanimity philosophers in all ages have agreed that of all human blessings the greatest is the enjoyment of personal liberty. The poets have not been behind the philosophers in their apostrophes to Liberty

'Tis Liberty alone that gives the flower
Of floating life its lustre and perfume,
And we are weeds without it

So Cowper sang, and his song has been re-echoed by innumerable voices. There has been less unanimity, however, as to what constitutes liberty, and still less as to the means by which it can most surely be attained and guaranteed. 'No obstacle', wrote Lord Acton, 'has been so constant or so difficult to overcome as uncertainty and confusion touching the nature of true liberty'¹. To him it meant 'the assurance that every man shall be protected in doing what he believes his duty against the influence of authority and majorities, custom and opinion'. And again 'Liberty is not a means to a higher end, it is itself the highest political end'. Aristotle observed that liberty was the special characteristic of a democracy as virtue was

The
Problem
of Liberty

¹ *Essays on Freedom*, p. 2

of an aristocracy and wealth of an oligarchy 'If liberty and equality, as is thought by some, are chiefly to be found in democracy, they will be best attained when all persons alike share in the Government to the utmost' He insisted, however, that liberty is not to be confused with licence 'Men think that freedom and equality mean doing what a man likes But that is all wrong, men should not think it slavery to live according to the rule of the Constitution, for it is their salvation' ¹

The Rule
of Law

What is the rule of the English Constitution? The most profound and discerning of German commentators on English political institutions found it in the supremacy of law Gneist characterized England in a single word as a *Rechtsstaat*—a commonwealth based upon justice and law France, with its system of 'administrative law', he regarded as the antithesis, in this respect, of England Yet France, as will presently be shown, regards the system of administrative courts and administrative law as the fulfilment of Montesquieu's doctrine of the separation of powers, and thus as an essential condition of liberty To the influence of that teaching in England and elsewhere frequent reference has been made in preceding chapters of this book Blackstone emphasized its significance in the eighteenth century 'Were [the Judicial power] joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their opinions, and not by any fundamental principles of law' ² Bacon, in the early years of the seventeenth century, had anticipated the doctrine of Montesquieu, though his own teaching on this vital matter was by no means free from ambiguity

The
Judiciary

'Judges', says Bacon, 'ought to remember that their office is *ius dicere*, and not *ius dare*, to interpret law and not to make law or give law' With the organs appropriate to the making of laws and to the execution of laws we

¹ *Politics*, IV, 4, §§ 22, 23, V 9, § 15

have already dealt. It remains to consider the third of the three primary functions of Government, that which is concerned with the interpretation or declaration of law, and the administration of justice.

Of all the functions of Government this is unquestionably of most immediate and intimate concern to the individual citizen. It matters not how elaborate the machinery of legislation may be, how scientific the product, how perfect the organization of the Executive, the life of the individual citizen may nevertheless be rendered miserable, his person and his property will be alike insecure, if there be any defect or delay in the administration of justice, or any partiality or ambiguity in the interpretation of law. There is, as Bacon wisely says, 'no worse torture than the torture of laws.'

A great jurist of the thirteenth century went so far as to affirm that 'it is for this end that the King has been created and elected, that he may do justice to all'.¹ The central clauses of *Magna Carta*, whatever the precise interpretation of words which have provoked much controversy, go far to justify Bracton.

'No free man', declared the Charter, 'shall be taken or imprisoned or disseised or outlawed or exiled or anyways destroyed, nor will we go upon him, nor will we send upon him, unless by the lawful judgement of his peers or by the law of the land. To none will we sell, to none will we deny or delay, right or justice'.²

Only by slow degrees have the promises contained in *Magna Carta* been redeemed, and they have been redeemed, as already indicated, mainly by the firm establishment of the 'rule of law'. That 'rule', however, has been rendered effective only by the differentiation of the functions appertaining to the exercise of sovereignty in its several spheres, legislative, executive, and judicial.

The first stage in the process of differentiation was to separate the judicial from the executive functions of the *Curia Regis*, the King in his Court. This process really

The *Curia
Regis*

¹ Bracton, *De Legibus Anglorum*

- *Magna Carta*, §§ 39, 40

began with the organization by Henry II of a central judicial body to which the name *Curia Regis* was thenceforward exclusively applied. But the process was slow, the *Concilium Ordinarium*, which may be regarded as the parent of the Privy Council, still retained judicial functions, some of which it carried into the *Commune Concilium*, or High Court of Parliament, some of which it retains in its more specialized form as the Privy Council.

Not was the development continuous. Under the Tudor dictatorship the multiplication of 'prerogative courts', such as those of the Star Chamber, the Court of the Marches, the Council of the North, and the Stannary Courts in Cornwall, enabled the Executive to exercise a considerable degree of practical control over the administration of justice. There is no evidence that these prerogative courts were during the Tudor period unpopular. On the contrary, men resorted to them freely, for there they got justice, which, if rough, was prompt and comparatively cheap.

Under the Stuarts. It was an entirely different matter under the Stuarts. What had seemed under their predecessors to be an appropriate cog in dictatorial machinery stood out as an oppressive engine of despotism. Encouraged by the great authority of Bacon, the first two Stuart kings endeavoured to subordinate the Judiciary to the Executive. 'Encroach not', said James I to the judges, 'upon the prerogative of the Crown, if there falls out a question that concerns my prerogative or mystery of State, deal not with it till you consult with the King or his Council, or both, for they are transcendent matters. That which concerns the mystery of the King's power is not lawful to be disputed.'¹ Bacon's language points not less clearly in the same direction. 'It is a happy thing in a State when Kings and States do often consult with judges, and again when judges do often consult with the King and State: the one when there is matter of law intervenient in business of state, the other when there is some consideration of state intervenient in matter of law. Let judges also remember

¹ Speech in the Star Chamber, 20 June 1616.

that Solomon's throne was supported by lions on both sides, let them be lions, but yet lions under the throne, being circumspect, that they do not check or oppose any points of sovereignty' ¹ The meaning is unmistakable the judges were to become the handmaids of the Executive, the principle familiar to-day in many countries that administrative acts are to be judged by administrative law was to be imported into English jurisprudence

The judges were not slow to take a hint dropped from a quarter so authoritative and influential Yet we need not on that account attribute to them an exceptional measure of subserviency The question as to the precise limits of the prerogative was admittedly difficult Selden insisted that the King's prerogative was 'not his will, or—what divines make it—a power to do what he lists' ² Cowell, on the contrary, held that the prerogative was 'that especial power, pre-eminence, or privilege that the King hath in any kind, over and above other persons and above the ordinary course of the common law, in the right of his crown' ³ Blackstone took much of the sting out of Cowell's unpopular *Interpreter* by substituting for 'above' the words 'out of' 'By the word Prerogative', he wrote, 'we usually understand that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity' ⁴ Blackstone thus substituted, as Dr Prothero pointed out, a constitutional doctrine for one destructive of the Constitution

Yet the judges, in the early years of the seventeenth century, were faced by a real difficulty James I was bent upon reducing to theory practices which under the popular dictatorship of the Tudors had not been resented Parliament was determined not only to assert a contradictory theory, but to alter the practice The judges were in a dilemma less because they wished either to oppose or to

The
Judges
under the
early
Stuarts

¹ *Essays 'Of Judicature'*

² John Selden, jurist (1581-1654), *Table Talk*.

³ John Cowell, Civil Lawyer (1554-1611), *The Interpreter* (1607)

⁴ *Commentaries*, i 7

respect constitutional theory than because constitutional theory was in many of its applications as yet imperfectly established

Bates's
Case,
1606 Take the much argued case of *Impositions*, raising the question as to the right of the Crown to impose additional duties upon various articles of import. The Tudors had freely and without question exercised the right in pursuance of the mercantilist policy of protecting home markets. If it was within the competence of the Crown to regulate trade, the Commons could hardly complain if the regulations were productive of revenue. The matter was raised by the imposition of a duty on currants imported from the Levant, and by the refusal of a merchant—Bates—to pay it. The case was tried in the Exchequer Court in November 1606, and was decided by the judges in favour of the Crown. 'Impositions' were admittedly on the border line, and that the judgement was legally correct few constitutional lawyers would be found to deny.

Unfortunately, however, Baron Clarke and Chief Baron Fleming, whose judgements alone have been preserved, based their decision upon 'political theories capable of wide and dangerous application'. Parliament acquiesced in the decision, but hotly contested the theory of the royal prerogative upon which it was based. The judgement emphasized the doctrine that the Crown possessed a twofold power—ordinary and extraordinary, the one ascertained and limited by law, the other to be exercised at the absolute discretion of the King—though always with a view to the *salus populi* of which he was, in a special sense, the guardian. Such a theory would, if ultimately adopted, have cut straight across the principles which lie at the root of our English 'rule of law' and would have led directly to the acceptance of the doctrines of 'administrative law'.

The Case
of the
Five
Knights,
1627 Essentially the same issue was raised in the case of *Sir Thomas Darnel* or the *Five Knights*. Darnel and others, having been committed to prison by the Privy Council for

refusal to contribute to the forced loan of 1626, appealed to the Court of King's Bench for a writ of *Habeas Corpus*. Relying on the clause of *Magna Carta* which declared that 'no man shall be imprisoned except by the lawful judgement of his peers or by the law of the land', they urged that they were at least entitled to know for what cause they were detained in custody. The Crown lawyers contended that it was sufficient return to a writ of *Habeas Corpus* to certify that the prisoners were detained *per speciale mandatum regis*—by the special orders of the King. The judges accepted this view so far as to refuse to liberate the five knights on bail, but, on the other hand, they declined to admit the principle that the Crown might persistently refuse to show cause.

The plea of prerogative was, therefore, for the moment successful. The discretionary power of the Crown—even to the extent of depriving a subject of liberty—was not denied by Stuart judges. But the triumph of the Crown—none too emphatic—was of short duration. Nothing did more to move the Parliament of 1628 to enthusiastic acceptance of the *Petition of Right* than the doctrine affirmed in the case of the *Five Knights*. The Petition itself, after recital of the clause already quoted from The Great Charter and subsequent Statutes, declared that 'against the tenor of the said Statutes divers of your subjects have of late been imprisoned without any cause showed, and when for their deliverance they were brought before your Justices, by your Majesty's writs of *Habeas Corpus* and their keepers to certify the causes of their detainer, no cause was certified, but that they were detained by your Majesty's special command, signified by the Lords of your Privy Council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the law.' The Petition further demanded that 'no free-man, in any such manner as is before mentioned be imprisoned or detained'.¹

¹ Gardiner, *History of England*, vi 213, and *Select Documents*, pp 2, 4.

The case
of ship-
money Precisely the same principle was raised by the even more
famous case of ship-money

Between 1629 and 1640 Parliament was never summoned, but money had to be raised to carry on the King's Government, and it was obtained by recourse to a variety of expedients. Monopolies were granted, contrary to statute, in some common articles of daily use, such as soap, salt, and wine, duties were imposed upon merchandise 'some so unreasonableness that the sum of the charge exceeds the value of the goods', obsolete feudal obligations, such as distraint of knighthood, were revived, the claims of the Crown to royal forests were asserted in the most extravagant way in the Forest of Dean alone seventeen villages had sprung up and were now compelled to ransom their property and to come under the jurisdiction of the forest law, profits were made from the sale of great offices of State, and a paltry fraud was practised upon the counties by the exaction of 'coat and conduct' money. In these and other ways the necessities of the King were partially supplied. But of all the devices to which a hard-pressed Treasury found it convenient to resort, none aroused so much popular clamour, or evoked such conspicuous resistance, as the collection of ship-money. On the 20th of October 1634 writs were issued to London and the other seaports bidding them deliver their quota of ships and men 'to the Port of Portsmouth before the first day of March next ensuing'. The avowed reasons for the levy are contained in the writ: 'Because we are given to understand that certain thieves, pirates and robbers of the sea as well Turks, enemies of the Christian name, as others, have spoiled and molested the shipping and merchandise of our own subjects and those of friendly powers'. Further, it refers to 'the dangers which on every side in these times of war do hang over our heads'. About a year later similar writs were addressed to the inland counties. The first writ merely revived an ancient custom which had been enforced without protest so lately as 1626. As to the second there is much doubt, but the judges gave

a strong opinion in favour of its legality. 'Your Majesty may . . . command all your subjects of this your kingdom at their charge to provide and furnish such a number of ships, &c. . . . for the defence and safeguard of the kingdom . . . and by law your Majesty may compel the doing thereof in case of refusal or refractoriness, and we are also of opinion that in such a case your Majesty is the sole judge both of the danger, and when and how the same is to be prevented and avoided.' London protested, but unavailingly, against the charge; individuals, like Lord Saye and Sele in Oxford and John Hampden in Buckinghamshire, did the same.

An opinion favourable to the rights of the Crown was given by the Judges in November 1635; but it served only to intensify the dismay and apprehension caused by the impost among all classes in the kingdom. Consequently, in February 1637, the King's case was again laid before the Judges, who were asked to decide whether, when 'the whole Kingdom is in danger' the King may call upon all his subjects to provide ships with 'mere victuals and munitions' for its defence, and 'by law compel the doing thereof in case of refusal or refractoriness', and whether 'in such a case the King is not the sole judge both of the danger and when and how the same is to be prevented and avoided'. The opinion given in writing over the signatures of twelve judges was on all points affirmative. The counsel for John Hampden had relied primarily on 'a multitude of records, beginning with one in King John's time and so downwards' to prove the illegality of taxation without consent; and while admitting that 'in this business of defence the *suprema potestas* is inherent in his Majesty, as part of his Crown and Kingly dignity', they contended that such *potestas* must under ordinary circumstances be exercised in and through Parliament. In a sudden emergency the King no doubt might and must act on behalf of the nation; but in what sense could emergency be pleaded in 1635? To all men it was notorious that ship-money was merely one in a series of

devices to enable the King to raise money without the disagreeable necessity of summoning Parliament

The judgement in the King's favour was based upon the most extravagant interpretation of the doctrine of *Prerogative* 'I have gone already very high,' said Sir Robert Berkeley, in his judgement, 'I shall go yet to a higher contemplation of the fundamental policy of our laws which is this, that the King of mere right ought to have, and the people of mere duty are bound to yield unto the King, supply for the defence of the kingdom' It has been the fashion to assume that judgement in favour of the Crown was due to mere servility on the part of the judges This may or may not be true On the other hand, the judgement may have been perfectly good in law The fact remains that, whether good or bad in law, the judgement was in its political effects infinitely mischievous Clarendon not merely admits but insists upon this 'I cannot but take the liberty to say that the circumstances and proceedings in those new extraordinary cases, stratagems and impositions were very unpolitic, and even destructive to the services intended' People are much more roused 'by injustice than by violence' Men who paid their quota more or less willingly were terrified by the grounds on which the judgement was based It was 'logic that left no man anything which he might call his own' 'Undoubtedly,' he adds, 'my Lord Finch's speech made ship-money much more abhorred and formidable than all the commitments by the Council-table and all the distresses taken by the sheriffs in England Many sober men who have been clearly satisfied with the expediency, necessity and justice of many sentences, depart notwithstanding extremely offended and scandalized with the grounds, reasons and expressions of those who inflicted those censures'¹

The Long Parliament made a clean sweep alike of the men and the machinery associated with the eleven years of the rule of 'Thorough' Ministers, Judges, and Ecclesi-

¹ *History of the Great Rebellion*, Book I

astics were impeached, Acts were passed to abolish the Prerogative Courts and to declare the illegality of ship-money, and, as we have seen, an attempt was made in the *Grand Remonstrance* to insist on the responsibility of Ministers to Parliament.

Yet the House of Commons, when relieved of the checks imposed by the Crown and the Second Chamber, was to prove itself no less inimical to personal liberty than the Crown itself. We have already noted the results which followed on the attempt of the unicameral Parliament to perform the functions not only of a Legislature but of the Executive and Judicature as well, and have quoted Cromwell's opinion of the 'hottest arbitrariness that ever existed on earth'. The accuracy of his description is undeniable. Never was there a more conspicuous illustration of the soundness of Montesquieu's doctrine, or more striking testimony to the wisdom of those peoples who have adopted it as the sheet-anchor of their constitutional liberties.

Common-
wealth
and Pro-
tectorate

The Parliaments of the Restoration and the Revolution completed the work which, begun by the Long Parliament, had been interrupted during the Commonwealth and the Protectorate. In 1676 the imprisonment, by order of the King-in-Council, of a London citizen named Jenkes brought to a head an agitation, which for some years past had been more or less persistently carried on in the House of Commons, in favour of more effectual guarantees for personal liberty. Owing to difficulties interposed by the Lord Chancellor and the Lord Chief Justice it was several weeks before Jenkes, who was accused of making a seditious speech at the Guildhall, was released on bail. Public attention was thus called to the inadequacy of the existing procedure for enforcing the right to personal liberty hitherto based only upon Common Law. As a result the *Habeas Corpus Amendment Act* was passed in 1679.

The
Habeas
Corpus
Act

Ever since Norman times the Common Law right to personal liberty had been secured, though hitherto imper-

Wills

fectly, by a variety of writs. The writ *de odio et atra* was intended to afford protection against malicious accusations of homicide. In consequence of King John's exaction of exorbitant sums for the issue of this writ the Great Charter provided that this 'writ of inquest of life or limbs should be granted without payment',¹ but the use of it gradually became obsolete. A second writ of *main-prise* authorized the sheriff to take sureties (*mainperners*) for the appearance of a prisoner, and having obtained them to set him at liberty. A third writ *de homine replegiando*, which was of similar import, commanded the sheriff to release a prisoner from custody on repledge or bail.

Writ of
habeas
corpus Most important of all was the writ of habeas corpus,² which gradually superseded the writs above mentioned. This writ, obtainable from the King's Bench, might be addressed to any person who, under legal pretence or otherwise, detained another person in custody. The detainer was ordered 'to produce the body of the prisoner with the day and cause of his caption and detention to do, submit to, and receive, whatsoever the judge or court awarding such writ shall direct'. Not, however, until 1679 was this procedure, though in use for many centuries, rendered really effective. The Petition of Right had, as we have seen, reaffirmed the principle of personal liberty so manifestly infringed in the case of the *Five Knights*, but it failed to provide an effectual guarantee for its application. The Act of the Long Parliament, which abolished the Star Chamber and all the procedure appertaining thereto, provided that any one committed to custody by the King or by the Council, could claim from the King's Bench or Common Pleas, without delay upon any pretence whatsoever, a writ of habeas corpus, and that within three days the Court should determine upon the legality of the commitment and act accordingly. There

¹ *Magna Carta* § 36.

For the 'Early History of Habeas Corpus', cf. R. Jenks, *Law Quarterly Review*, viii, 164.

still existed, however, various methods of evading the action of the writ, even when it had been issued by the Court

The Amending Act of 1679 was designed to put a stop to these evasions and delays. It enacted that any person detained in custody (unless committed for treason or felony) should be produced for trial within twenty days at longest, and if the commitment were within twenty miles of the Court whence the writ issued, then within three days. Nor could a person once delivered by habeas corpus be recommitted for the same offence. Further, all prisoners must be tried at the next gaol delivery or else released on bail, and after the second gaol delivery must, if still untied, be discharged. To prevent delays any Court was authorized to issue a writ, or, in vacation, a single judge. Finally, no inhabitant of England, Wales, or Berwick-upon-Tweed was, save under certain specified circumstances, to be imprisoned in Scotland, Ireland, Jersey, Guernsey, or Tangier, or any place beyond the seas.¹

Habeas Corpus Act, 31 Cu II, c. 2

The Act of 1679 has, from the day of its enactment, remained a corner-stone in the edifice of personal liberty, and its principles have been adopted throughout the English-speaking world. But experience revealed certain weaknesses in the Act. It fixed no limit to the amount of bail that might be demanded. The Bill of Rights (1689) accordingly enacted that excessive bail ought not to be required, while a later Act of 1816 extended the action of the writ to non-criminal charges, and authorized the judges to examine into the truth of the facts alleged in the return to the writ, with a view to bailing, remanding, or even discharging the prisoner.²

Neither a *Habeas Corpus Act* nor any other Act can, however, secure the liberty of the subject against the Executive, unless those who have to administer the Acts are placed in a position of complete independence. So long

Position of the judges

¹ Robertson, *Select Statutes, Cases and Documents*, 45-51

² Hallam, *Constitutional History*, III 14-15

as the judges are 'lions under the throne' there can be no effective guarantee for personal liberty. The highest importance must, therefore, be attached to the change in the tenure of the judges effected by the Act of Settlement.

Under the early Stuarts the judges had been repeatedly reminded that they held office at the good pleasure of the King. Chief Justice Coke was dismissed by James I in 1616 for refusal to assent to the King's wishes in the case of *Commendams*. Chief Justice Crew was dismissed in 1626 by Charles I for his refusal to admit the legality of forced loans. Chief Justice Heath incurred a similar penalty in 1634 for his opposition to ship-money. Charles II dismissed, for political reasons, three Lord Chancellors, three Chief Justices, and six judges. James II carried out a still more drastic purge of the judicial bench, and even struck off the Commission of the Peace local justices who showed themselves disinclined to abet his tyranny. The *Act of Settlement* finally took out of the King's hands this dangerous weapon. It enacted that 'after the limitations shall take effect as aforesaid, judges' commissions be made *quandiu se bene gesserint*, and their salaries ascertained and established, but upon the address of both Houses of Parliament it may be lawful to remove them'. Thus was the independence of the judicial bench definitely secured. Their salaries are now charged upon the Consolidated Fund, and they are virtually irremovable.

General
Warrants

Yet despite the *Habeas Corpus Act* and *Act of Settlement* individual citizens were to discover in the course of the eighteenth century that there still survived 'remnants of a jurisprudence which had favoured prerogative at the expense of liberty'.¹ One such survival was illustrated by the career of the notorious John Wilkes. In 1763 Lord Halifax, the Secretary of State, issued a general warrant for the apprehension of the authors, printers, and publishers of No. 45 of a certain paper, the *North Briton*, and for the seizure of their papers. No persons were named in the warrant, but no fewer than forty-nine

¹ Erskine May, *Constitutional History*, III, 2.

persons were arrested under this roving commission—this 'ridiculous warrant against the whole English nation', as Wilkes himself termed it. Eventually the authorship of the incriminated article was discovered. Wilkes was arrested and brought before the Secretaries of State, and by them committed to close confinement in the Tower, whence he was shortly released, on a writ of habeas corpus, by reason of his privilege as a Member of Parliament.

The legality of the whole procedure was promptly questioned in the Courts. Some of the arrested printers recovered £300 damages against the messengers, Lord Chief Justice Pratt having held that the general warrant was illegal, that it was illegally executed, and that the messengers were not indemnified by Statute. The same judge also decided against the competence of a Secretary of State to issue warrants, declaring that such a power 'may affect the person and property of every man in this Kingdom, and is totally subversive of the liberty of the subject'. In this case Wilkes recovered £1,000 damages against Mr. Wood, the Under-Secretary of State, who had personally superintended the execution of the warrant and eventually got £4,000 damages from Lord Halifax himself for false imprisonment. The Court of Common Pleas also decided against the legality of a search warrant for papers, and Mr. John Entinck obtained £300 damages from a messenger who had executed it. These decisions were subsequently confirmed—so far as the House of Commons can confirm a judicial decision—by resolutions of the House of Commons condemning general warrants, whether for the seizure of persons or papers, as illegal, and declaring them, if executed against a member of the House, to be a breach of privilege. The House of Lords, it is true, rejected a declaratory Bill, passed by the Commons, in which these resolutions were embodied; but the practice of general warrants had been emphatically condemned and was not revived.

In 1792 an Act, commonly known as Fox's *Libel Act*, The Law of Libel was passed to remove doubts as to the competence of

a jury to give their verdict upon the whole matter in issue and not merely upon the fact of publication. In the recent case (1783) of the Dean of St Asaph, Mr Justice Buller had left to the jury only the question of publication, and Lord Chief Justice Mansfield, on a motion for a new trial on the ground of misdirection by the judge, had held that he was right. The effect of Fox's Act has been to leave to the jury the question as to whether the words complained of do or do not constitute libel. Formerly that had been the province of the judge, and the Judiciary had tended to support the Executive of the day. Consequently, Fox's Act has commonly, and rightly, been regarded as a notable contribution to the liberty of the individual citizen. Another notable contribution was made by Lord Campbell's *Libel Act* of 1843, which permits a defendant to plead that the statements complained of are true and their publication is in the public interest, and also relieves a publisher of liability if he can prove that the publication of the libel was without his consent.

Freedom
of Speech

These Acts, taken in conjunction with the lapsing of the censorship of the Press in 1695, constitute the foundations of that liberty of speech and writing on which Englishmen are prone to congratulate themselves. Yet, as Dr Dickey pointed out, no principle of freedom of discussion is recognized by English law. English law only secures that no one shall be punished except for statements proved to be a breach of the law. Nor is there, broadly speaking, anything which can be called a 'press law'.¹ The freedom of the Press is based not on any specific enactment but upon the right of individual journalists to write what they will so long as they avoid collusion with the law of libel.

'The law of England', says Lord Ellenborough, 'is a law of liberty, and consistently with this liberty we have not what is called an *imprimatur*. There is no preliminary licence necessary, but if a man publish a paper he is exposed to the penal consequences, as he is in every other act if it be illegal'.²

¹ Dickey *Law of Constitution*, Lecture vi
Rev v Cobbett, 29 State Trials, 49

The so-called 'right of public meeting' rests upon precisely parallel foundations. It arises simply from an aggregate of the rights of individuals. The right of assembling is, as Mr. Dicey has said, 'nothing more than a result of the view taken by the Courts as to individual liberty of person and individual liberty of speech'.¹ Most foreign constitutions specifically and in terms guarantee to the citizen freedom of speech and the right of public assembling. The rights of the individual are in such cases deducible from and dependent upon constitutional law. With us, on the contrary, the law of the Constitution is inductively built up from the rights of individual citizens. And the latter provides perhaps a more secure basis. It is evidently more difficult to suspend or even curtail the rights of 40,000,000 individuals than to abrogate an article in a constitutional code.

The
Right of
Public
Meeting

But, though more difficult, it is not impossible. Some curtailment of the ordinary rights of the citizen is, in periods of public danger or apprehension, plainly inevitable. The right to personal liberty being guaranteed to a large extent by Statute may be thought to stand in a class apart. Accordingly it is the less remarkable that the *Habeas Corpus Act* should have been from time to time temporarily suspended. Yet it is noteworthy that the suspension has only been partial; it has never been general; the action of the writ has been suspended only in the case of persons charged with certain specified crimes such as treasonable practices. Between 1688 and 1745 it was suspended nine times: several times immediately after the accession of William and Mary; again during the Jacobite rising of 1715; for a whole year during the alarm caused by the Jacobite 'Plot' of 1720-1; and again, in consequence of the Young Pretender's invasion in 1745. It was not deemed necessary to suspend the *Habeas Corpus Act* during the American rebellion, but in 1777 an Act was passed empowering the King to secure persons suspected of high treason committed in America, or on the high seas, or of the crime of piracy.

War and
Liberty

¹ *Op. cit.*, p. 285.

The
Revolu-
tionary
and
Napole-
onic Wars

The longest and most notable period during which the guarantees for personal liberty have been suspended in England was that which followed the outbreak of war with Revolutionary France. The younger Pitt has been frequently charged with initiating a system of brutal coercion designed less to repel the assault of French Jacobinism than to suppress Liberalism at home. The charge is manifestly unfair. There are some questions in the determination of which the historian has obvious advantages over contemporary criticism. But in an attempt to estimate the gravity of symptoms of political and social unrest the advantages are all the other way. Those contemporaries who were in the best position to know the facts had no doubt as to the reality and gravity of the conspiracy against which both the Executive Government and the Legislature of the day felt bound to adopt elaborate precautions. On more than one occasion Pitt, in order to fortify the position of the Executive, procured the appointment of a Committee of Secrecy selected by ballot. The Committee of 1794, which was in full possession of the information at the disposal of the Government, reported that there existed 'ample proofs of a traitorous conspiracy'. Among later critics those are least disposed to question Pitt's wisdom who have themselves occupied the same position of responsibility. Thus Lord Rosebery writes with a combination of sound sense and epigram 'What has been rendered abortive it is common to think would never have possessed vitality'.¹ The late Lord Salisbury has left on record his own opinion that 'strenuous efforts were made to bring about a bloody revolution such as that which was raging in France'.² Thanks in large measure to the precautions adopted by Pitt those efforts were happily abortive.

That the precautions necessitated some curtailment of the ordinary liberties of the citizen is undeniably and unfortunately true. In December 1793 the traditional hospitality extended by Great Britain to foreigners of

¹ *Pitt*, p. 287

² *Essays*, I, p. 168

every description was temporarily interrupted. The *Alien Act* placed foreign immigrants under severe restrictions and gave the Secretary of State a discretionary power of expulsion. Originally passed for one year only, the Act was renewed from time to time and was not finally repealed until 1826. The Executive was again armed with similar powers during the revolutionary period of 1848, but did not find it necessary to exercise them. In 1794 the *Habeas Corpus Act* was suspended until 1801, a period of suspension unprecedented in duration.¹

In view of the grave reports made by a Secret Committee in 1817 the Act was again suspended, but the suspension lapsed on 1st March and has never since that day been re-enacted for Great Britain, though recourse to this precaution has unfortunately been frequently found necessary in Ireland. In 1801, and again in 1818, it was deemed desirable to pass an Act of Indemnity for all those who, in virtue of the powers conferred upon them by the suspensory Acts, had detained suspects in custody or had suppressed 'tumultuous and unlawful assemblies'.

Suspension of
Habeas Corpus
Act

The *Indemnity Act* of 1818, though a natural sequel of the suspension of the *Habeas Corpus Act*, and in accord with precedent, was fiercely opposed in both Houses. The passing of such an Act may, however, be accepted as striking testimony to the way in which the principle of habeas corpus has interwoven itself with the fibres of the English Constitution. It is noticeable that, though other precautions were necessarily taken, the *Habeas Corpus Act* was not suspended during the Great War 1914-18.

The *Alien Act* and the *Suspensory Act* did not stand alone during the French War. In 1795 was passed the *Treasonable Practices Act*, which created a new law of treason, dispensed with the proof of overt acts, and made any writing, printing, speaking and preaching, or inciting to hatred or contempt of the Sovereign, or the established Government or Constitution, a high misdemeanour. The

¹ Robertson, *England under the Hanoverians*, p. 364. Erskine May, *op cit*, vol. III, pp. 12, 50.

Seditious Meetings Act (also passed in 1795) prohibited meetings of more than fifty persons without notice to a magistrate, and empowered the magistrate to attend and break up a meeting, if, in his opinion, it was tumultuous. The control of the Government over the Press was tightened by increasingly stringent regulations, the stamp and advertisement duties were increased, and unlicensed debating societies and reading rooms were placed on the same footing as brothels. To assert, as does Sir Erskine May, that by such measures 'the popular Constitution was suspended' would seem to savour of exaggeration. The liberties of the citizen were unquestionably curtailed, but it is at least an open question whether without temporary curtailment those liberties could have been permanently preserved.

The Great
War,
1914-18

A situation in many respects strikingly parallel to that of 1793-1815 recurred in 1914-18. To the drastic measures enforced during the earlier crisis there was, indeed, no recourse during the later, but by the *Defence of the Realm Act* extended powers were conferred upon the Executive and numerous regulations were issued and enforced. A censorship of the Press and of correspondence was an obvious military precaution, but the censorship itself was of a limited character, it was not invested with an autocratic power of veto, it could advise, and the advice was usually followed, it could forbid, but to disobey its prohibition was not in itself an offence in law, an editor could not be prosecuted on the charge of having published matter which the Press Bureau had forbidden, he could only be charged with having published matter which, on certain specified grounds, was injurious to the national interest, and it was for the Courts, not for the censorship, to decide, in the last resort, whether the matter complained of was injurious. If the Executive seized, as it did, the plant of an offending journal, the legality of the seizure could be tested by an action for damages for trespass. In fine, it is, as Sir Herbert Samuel, who was Secretary of State, has forcibly remarked, 'an

error to suppose that the Government sought, or Parliament established, a censorship above the law ' ¹

Nor did the Government attempt to prohibit the expression of opinions in opposition to the war. It did prohibit the communication of military information useful to the enemy, propaganda against voluntary recruiting, attempts to induce men liable to compulsory service in the army to disobey the law, attempts to foment strikes or disaffection among the workmen in essential occupations. The citizen was, however, free to express opinions as to the origin of or responsibility for the war, as to ending it, and as to the propriety of conscription ². A demonstration proposed to be held on Easter Sunday, 1916, in Trafalgar Square was indeed prohibited, under the *Defence of the Realm Act*, but less because it was a 'peace' demonstration than in the interests of public order in London. Elsewhere meetings with similar objects were permitted. On the whole the Act was administered as regards freedom of speech and of the Press with conspicuous, and as some thought excessive, regard for the rights of individuals.

Not less conspicuous was the regard shown for personal liberty. By a regulation, No 14, B, made under the *Defence of the Realm Act*, the Secretary of State was empowered to order the internment of any person 'of hostile origin or associations', when he considered internment expedient in the interests of public safety. Many persons were so interned, and by test cases carried to the House of Lords the Judiciary confirmed the legality of the methods employed by the Executive. Those methods were, however, incomparably less drastic, though the public safety was, perhaps, even more imperilled, than during the Napoleonic wars.

The Executive was less tender in regard to rights of trading and property. No one could question the propriety of the regulations, perhaps insufficiently drastic, to

¹ *The War and Liberty* (London, 1917), pp. 32-3.

² House of Commons *Official Report* for Jan 17, May 3, and June 1, 1916, referred to by Samuel, *op. cit.*, p. 40.

prevent trading with the enemy, but there was naturally less unanimity in regard to some other matters. The Government took possession, under the elastic terms of D O R A, of land, buildings, plant, commodities, securities, they regulated investments, restricted imports, fixed prices, and controlled the purchase of food, they forbade the manufacture of this and insisted upon the manufacture of that. Yet here again the dictatorship was at once temporary and legal. The Courts were open to the aggrieved citizen, but although the 'rule of law' was not transgressed the latitude given by the law to the Executive made many hard cases.

Recent tendencies Yet there would be little ground for apprehension if the citizen could feel assured that the increased power exercised by the Executive were merely a transitory phenomenon, and that emergency legislation would leave no permanent mark upon the Constitution. Still more assurance would be felt if it could be shown that the intrusiveness of the Executive were only an incident—an inevitable incident—of war-time, and that the phenomenon was not discernible before the year 1914. Unhappily, no such assurance is possible. A comparison of the first and last editions of Mr Dicey's illuminating work, published respectively in 1885 and 1915,¹ supplies a conclusive illustration of this statement. No part of the earlier edition attracted more attention, alike in this country and among foreign publicists, than the author's unqualified insistence upon the 'Rule of Law', as observed in England, in contrast with the *droit administratif* which is a characteristic feature of the administrative system of France, as of all countries which have adopted the principles of the *Code Napoléon*. The 'rule of law' was then reduced by Mr Dicey to three distinct propositions.

1 'That no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land',

¹ Eighth Edition

2 ' That not only is no man above the law but (what is a different thing) that here every man whatever be his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals ', and

3 ' That with us the law of the Constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals as defined and enforced by the courts '

The first proposition asserts, in the most emphatic manner, the right of the individual citizen to personal liberty. No man is punishable except for a proved offence against the law. Two points are noteworthy: (1) there must be a distinct breach of the law, and (2) this breach must be proved in the ordinary legal manner before the ordinary courts of the land. To most Englishmen such a proposition must seem to be an obvious commonplace. But if we would understand its full significance, we need only turn to the experience of France under the *Ancien Régime*, or to the events, briefly summarized above, of our own history in the first half of the seventeenth century. Charles James Fox, on hearing of the fall of the Bastille (14 July 1789) is said to have exclaimed ' How much the greatest and best event that ever happened in the history of the world ! ' To us such an exclamation would seem to be the outcome of political hysteria. It becomes intelligible, however, when we realize that the Bastille was the outward and visible sign of a judicial system which was the negation of the first proposition of our ' rule of law '. Hundreds of men had under that system suffered loss of liberty not for distinct and proven breach of the law but because they had rendered themselves obnoxious to those who were powerful enough to procure a *lettre de cachet* consigning their enemies to imprisonment which might be lifelong. The Bastille stood not for the rule of law, but for the rule of privilege. Hence its destruction was hailed, alike by Frenchmen and by sympathizers abroad, with an

enthusiasm which to the average Englishman seems hysterical. In proportion, however, as we appreciate the blessings of the 'rule of law' can we sympathize with the destruction of the rule of might.

If the first rule illustrates the 'legality' of our Constitution, the second supplies a guarantee for its impartiality.

It is commonly said that in England 'there is one law for all', that 'all men are equal before the law'. It may be doubted whether half the people who quote these aphorisms are aware of their precise significance. They not only affirm an important principle, but point an instructive contrast. In England not only is no man 'above the law', but every man is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. Thus, to a constitutional lawyer, is the real meaning of the assertion, constantly reiterated, that in England Ministers are 'responsible'. Strictly speaking, as Maule pointed out, 'Ministers are not responsible to Parliament, neither House, nor the two Houses together, has any legal power to dismiss one of the King's Ministers. But in all strictness the Ministers are responsible before the Courts of Law, and before the ordinary Courts of Law, and they are there responsible even for the highest acts of state, for those acts of state they can be sued or prosecuted, and the High Court of Justice will have to decide whether they are legal or no'.¹

These rules of law provide the foundations on which the whole fabric of personal liberty has, in this country, been erected. They also point to a contrast between the legal and administrative system of our own country and that of countries where the *droit administratif* is administered by *Tribunaux administratifs*.²

¹ *Const Hist.*, p. 484.

² The extent of this contrast was undoubtedly overstated, even if the nature of it was not misunderstood, by Dicey when he published the earlier editions of his great work. The following paragraphs will show that Dicey did in some measure recognize these truths, though he was naturally reluctant to retract his original propositions and rather disposed to attribute the necessity for restatement to a change in the facts of the situation. Unquestionably recent tendencies, both in

In the introduction to the latest edition of the *Law of the Constitution* Mr Dicey, while affirming that the principles laid down in the original treatise with regard to the rule of law and to the nature of *droit administratif* were little changed, nevertheless deemed it proper to call attention to a 'singular decline among modern Englishmen in their respect or reverence for the rule of law, and to certain changes in the *droit administratif* of France' ¹

Declining
respect
for law

He found proof of the declining veneration for the rule of law in England in three directions (i) in the character of recent legislation, (ii) in the existence among some classes of a certain distrust both of the law and of the judges, and (iii) in a marked tendency towards the use of lawless methods for the attainment of social or political ends. The last he attributes to a variety of causes. Firstly, to the fact that a vote has now been given to citizens who 'partly because of the fairness and the regularity with which the law has been enforced for generations in Great Britain hardly perceive the risk and ruin involved in a departure from the rule of law'. The consequence is that large classes of 'otherwise respectable persons now hold the belief and act on the conviction that it is not only allowable but even praiseworthy to break the law of the land if the lawbreaker is pursuing some end which to him or her seems to be just and desirable'. In this connexion he instances certain of the English clergy, passive resisters against education rates, those who 'conscientiously' object to vaccination, and militant suffragettes. Other illustrations of this deplorable tendency

England and on the Continent, have been very markedly in the direction opposite to that indicated by Dicey forty years ago.

Just as this book is going to press an exhaustive treatise on *Public Authorities and Legal Liability* has been published by Dr. Gleeson F. Robinson (London University Press, 1915). To this treatise Professor J. H. Morgan contributes a most valuable introduction, in which he rightly emphasises and illustrates recent tendencies, though his structures on Dicey are perhaps unduly severe and take too little account of the modifications of his original views to which Dicey himself called attention. But Dr. Robinson's valuable work and Mr. Morgan's brilliant introduction deserve the close attention alike of jurists and legislators.

would doubtless have occurred to him (as they will occur to others) had the Introduction been written even a few months later than it was

The tendency may also, in Dicey's opinion, be attributed to the democratic sentiment that law should on the whole correspond with public opinion, and to the perplexity occasioned thereby to the honest democrat when he is confronted by the phenomenon of a large body of citizens who are not only opposed to a particular law but actually question the moral right of the State to impose or maintain it. Hobbes held that no law could be unjust. Many worthy citizens now hold that any law is unjust which is opposed to the deliberate convictions of a large body of citizens, and that it may rightly be resisted by the use of force. Yet that way lies the dissolution of society.

A third explanation, if not justification, for lawlessness Mr. Dicey found in the 'misdevelopment of party Government' which would sometimes tend to confuse loyalty to a party with allegiance to the State. But candour compels him to add that no one who sympathizes with the principles of the Revolution of 1688 can refuse to admit that 'crises occasionally, though very rarely, arise when armed rebellion against unjust and oppressive laws may be morally justifiable'. Yet no loyal citizen will be quick to emphasize this admission. Discussion of so delicate a point is, however, outside the scope of this work.

Tenden-
cies in
Legisla-
tion

More pertinent to our immediate purpose is the marked tendency of recent legislation to confer judicial or quasi-judicial authority upon officials and public departments. Reference has already been made to this tendency in a preceding chapter.¹ Mr. Dicey further illustrates it by reference to the powers conferred upon Local Education Authorities by Section 7 of the *Education Act* of 1902, upon the Insurance Commissioners and other officials by the *National Insurance Acts* of 1911 and 1913,² and upon the Commissioners of Customs and Excise and the Commis-

¹ *Supra*, c. xvi.

² Cf. in particular §§ 66, 67, and 88 (1) of the Act of 1911.

sioners of Inland Revenue by the *Finance Act* of 1910. He also refers to Section 3 of the *Parliament Act* of 1911 which appears to put the Speaker of the House of Commons above the law, by enacting that any certificate given by him under the Act 'shall not be questioned in any court of law'.

A tendency already marked was naturally accentuated by the circumstances of the Great War. Inevitably, as we have seen, the Legislature was compelled to delegate much of its authority to subordinate bodies, and in particular to the Public Departments old and new.

The War
and
Bureau-
cracy

It is evident that the position of the Judiciary has been thereby rendered infinitely more difficult, and at the same time even more responsible. During the War administrative regulations poured from public departments with such bewildering rapidity that even lawyers find it almost impossible to ascertain whether official claims alleged to be based upon such regulations were or were not legally justified. The difficulty, hardly noticed in the ferment of war, was accentuated when, after the conclusion of peace, private citizens attempted to enforce their rights against the Crown.

The
Judges
and the
Law

'I personally feel', said Lord Justice Scrutton, 'that the whole subject of proceedings against Government Departments is in a very unsatisfactory state. It is of great public importance that there should be prompt and efficient means of calling in question the legality of the action of Government Departments, which owing to the great national emergencies arising out of the war, have been inclined to take action that they considered necessary in the interests of the State without any nice consideration of the question whether it was legal or not.'¹

The Judiciary has, on the whole, shown itself tenacious of its honourable tradition in favour of the rights of private subjects, even when in conflict with the Crown. But the *Defence of the Realm Acts* and the innumerable regulations issued under those Acts placed many obstacles

The
Defence
of the
Realm
Acts

¹ *Marshall Shipping Co v Board of Trade* [1923], 2 K B at p 352

in the path of the lions of justice. On Friday, 7 August 1914, the *Defence of the Realm Act* passed, without discussion, through all its stages in the House of Commons, and on Saturday the 8th received the Royal assent.¹ On 28 August a further Act was passed, and the *Defence of the Realm Consolidation Act* became law. Neither the Consolidating Act nor its immediate predecessor reproduced the title of the Act of August 8, and the omission to do so had special significance. The first of the series was designed 'to confer on His Majesty power to make regulations during the present war for the defence of the Realm'. Had the Executive in the meantime received warnings that the title might prejudice and limit the Prerogative and hamper the action of the Government? However that may be, the fact remains that the Consolidating Act was declaratory. It declared that 'His Majesty in Council has power', &c. Nor was the sword thus placed in the hands of the Executive allowed to rust.

The Case
of Requi-
sition

The Crown even went so far as to attempt to establish a right to expropriate the subject without compensation, but the attempt was stoutly and properly resisted. The leading case was that of *De Keyser's Royal Hotel*, which in 1916 was requisitioned by the War Office. The requisition was in order, but the question was subsequently raised whether the Crown could requisition the hotel without paying legal compensation. The Crown did not, of course, propose to seize private property without compensation, but it claimed that this payment should be 'of grace' and that the amount should be determined by the Defence of the Realm Losses Commission—subsequently known as the War Compensation Court. The proprietors of the hotel declined to accept anything as of grace: they claimed their legal rights, and the case was ultimately decided in their favour by the House of Lords. Before judgement was given, very elaborate researches into historical precedents were carried out, and referring to these Lord Swinfen said: 'It does not appear that the Crown

¹ 4 & 5 Geo V, c 29

has ever taken the subject's land for the defence of the realm without paying for it, and even in Stuart times I can trace no claim by the Crown to such a prerogative.¹

A different but not less important point was raised by a sheaf of cases which arose from the attempt of the Executive to raise a revenue for the State without the sanction of Parliament. Various Ministries were, during the War, empowered to grant licences for the export, import, and distribution of commodities, for the sale of ships, and other purposes. The Food Controller refused to grant a licence for the sale of milk to a large dairy company unless and until it agreed to pay a toll of 2d per gallon on the milk sold. The tolls were paid, but, as the company contended, under duress, and they claimed, after the War, that the money, illegally extorted, should be refunded. The House of Lords finally decided that the imposition amounted to taxation imposed on the subject without the authority of Parliament and was consequently illegal.

Revenue
from
Licences

The prospect of having to repay not only the amount claimed by the *Wills United Dairies, Ltd.*, but by many other subjects upon whom similar impositions had been laid alarmed the Treasury, and in 1922 a Bill was introduced, and in somewhat amended form became law in 1925. The resolution on which the Act was founded sufficiently explains its scope. It affirmed

The War
Charges
Validity
Act

'that it is expedient to give legal validity to the imposition and levying of certain charges which, during the late war, certain Government Departments, purporting to act in pursuance of powers conferred by the Defence of the Realm Regulations, or otherwise, imposed by way of payments required to be made either on or in connexion with the grant of licences or permits issued or purporting to be issued in pursuance of the said powers or in connexion with the control of supplies or of the prices of certain commodities other than milk.'

The last words are significant. Parliament hesitated to

¹ On the whole of this exceedingly interesting and important case, cf. *The Case of Requisition*, by Sir Leslie Scott and A. Hildesley, with an introduction by Sir John Simon. Oxford, 1920.

invalidate a judgement of the House of Lords That judgement still stands, and the dairy company obtained its money, but the claims of others, similarly situated, were barred, and the Treasury remains in possession of funds which it had secured by a process admittedly illegal, though neither vindictive, nor even, under the circumstances, unreasonable Nevertheless the *War Charges Validity Bill* raised serious misgivings in the minds of those to whom the independence of the Judiciary and the liberty of the subject are pearls of even greater price than the balancing of the national budget If ever a validating Act could be justified, however, it was in this case Illegal as the action of the Executive was, it had inflicted no damage on the licensees They had paid for a privilege which was presumably as lucrative to themselves as it was to the State The blunder was technical rather than substantial, and though a protest was properly entered against the type of legislation which the Act represented, it may be that greater injustice would have resulted from its rejection than from its enactment

Indem-
nity Act,
1920

Of similar import, though much wider scope, was the Act which had been passed in 1920 to 'restrict the taking of legal proceedings in respect of certain acts and matters done during the War, and provide in certain cases remedies in substitution therefor, and to validate certain proclamations, orders, licences, ordinances, and other Laws issued, made, and passed, and sentences, judgements and orders of certain Courts given and made during the War' Some legislation of the sort was obviously necessary after a period of such profound upheaval, but an indemnity Act being, in Mr Dicey's words, 'the legalization of illegality' needs to be very closely scrutinized Scrutiny in this particular case showed that the Bill had been drawn in exceptionally wide terms, it was stoutly opposed during its passage through Parliament, and the Lords inserted valuable amendments The general effect of the Act was to close the doors of the ordinary Courts to persons who alleged damage and loss

at the hands of the Executive during the War, and to compel them to seek *ex-gratia* redress at the hands of a tribunal which might fairly be described as 'administrative'.¹ Thus the distinction between England and those countries where the *droit administratif* obtains has unquestionably diminished, but it would be a palpable error to suppose that it had been removed. Whether the subject gains or loses by the existence of administrative Courts is a question which, in the opinion of some recent writers,² has been too hastily answered. But the consideration of that question must be postponed.

¹ For debate on Second Reading of *Parliamentary Debates, Commons*, vol. 125 pp. 1741-1855. Cf. especially speeches of Sir F. Pollock and Sir Gordon Hewart (subsequently Master of the Rolls and Lord Chief Justice respectively, Mr. (now Sir) Leslie Scott and Sir F. (now Lord) Goss.

² See in particular articles on the Growth of Bureaucracy by Mr. C. K. Allen, *Quarterly Review*, No. 477, and Robinson and Morgan, *Public Authorities and Legal Liability*.

XXXII THE ADMINISTRATION OF JUSTICE (2)

The Courts of Law

'It is for this end that the King has been created and elected that he may do justice to all'—BRACTON (13th century)

'No free man shall be taken or imprisoned or disseised or outlawed or exiled or anyways destroyed, nor will we go upon him, nor will we send upon him, unless by the lawful judgement of his peers or by the law of the land. To none will we sell, to none will we deny or delay, right or justice'—*Magna Carta*, §§ 39, 40

THE preceding chapter was concerned with the problem of Liberty, and indicated the way in which that problem has been solved in England by the gradual establishment of the 'Rule of Law'. Of that rule the Judges are the guardians and trustees. Their position in the Polity is consequently of supreme importance to the individual citizen, to his enjoyment of life, liberty, and property. The general position of the Judiciary in England has been already discussed, in particular, attention has been paid to the practical application of Montesquieu's doctrine of the separation of powers, and to the necessity of keeping the judicial functions of Government separated, as clearly as may be, from the executive and legislative functions. Apart from the elementary principles of the division of labour it is plainly desirable to separate the Judiciary from the Legislature in order that there may be no confusion between the question as to what the law is, and what the law ought to be. It is, moreover, of supreme moment to the maintenance of justice in the Commonwealth that law should be applied according to an established and impartial method of interpretation. This end is more likely to be attained, as Mr Henry Sidgwick pointed out, if those who apply the law are not also responsible for its enactment.¹ Not less important is it, as already indicated, that the judicial power should be separated

Law and
Justice

¹ *Elements of Politics*, p. 345

from the Executive. Nothing, as we have seen, can be of greater moment to the individual citizen than that the Executive should be kept within the restraints of law. Yet those restraints 'can hardly be expected to be effective unless the question whether acts done by Executive officials are or are not illegal can be referred—in the last resort—to the judicial decision of some organ independent of the Executive'.¹ Such an organ is also necessary in order to determine any conflict which may arise between the legal rights of one citizen and another, to compel the individual to perform his legal obligations as a citizen, and to punish those who transgress the law. 'In determining a nation's rank in political civilization,' writes Mr Henry Sidgwick, 'no test is more decisive than the degree in which justice as defined by the law is actually realized in its judicial administration, both as between one private citizen and another, and as between private citizens and members of the Government'.²

The same writer lays down the essential conditions of a system such as will enable a nation to satisfy this test. The first essential is a judicial bench at once learned, skilled, impartial, incorruptible, and independent. The second is that the Courts in which justice is administered should be sufficiently numerous and accessible to all suitors, and a third is that no one should be hindered either by official or private obstruction from seeking judicial remedies for legal wrongs. Accordingly, 'the judicial process should be as simple, short, and inexpensive as is consistent with adequate security for justice, and adequate provision for the correction of judicial errors', while at the same time 'vexatious litigation should be discouraged lest the remedies for social mischief prove worse than the disease'.³

In the light of principles thus laid down we may now proceed to analyse the actual organs of the judiciary in England and to describe the machinery by which the law is administered. The task is greatly simplified by the fact

¹ *Op cit.*, p 343² *Op cit.*, p 457³ *Op cit.*, p 517

that the machinery was completely overhauled in the years 1873-94

The Courts may be divided into two categories (1) the Central or 'Superior' Courts located (with exceptions to be noted presently) in London, and (2) the 'Local' or 'Inferior' Courts scattered throughout the country. They may further be subdivided into *civil* and *criminal* Courts which are concerned with rights of citizens *inter se*, in other words with *private law*, and Courts which are concerned with offences against the Crown, as representing the State, in other words with *crime*—a breach of *public law*. The Courts of Law

We deal first with procedure in *criminal* cases, and trace it from the lowest to the highest rung of the judicial ladder. Criminal Justice

Offences against the Criminal Law are of two kinds—indictable—the more serious—and non-indictable. An 'indictment' is technically an accusation preferred by a Grand Jury of Presentment, an institution the history of which must be sought in the *origines* of the English Constitution. The value of this ancient institution has indeed of late years been impugned, but the weight of authority is in favour of its retention, as a safeguard of the liberty of the subject.¹ Certain 'indictable' offences may, however, be dealt with 'summarily'—notably offences committed by children and young persons, and cases in which the value of the property in question does not exceed 40s, and when the accused elects to be tried by the Court of summary jurisdiction, or when the accused pleads guilty.

Non-indictable offences are dealt with summarily by a Court consisting of Justices of the Peace, or by a stipendiary or Police magistrate, who is invested with the powers of two ordinary Justices of the Peace and may consequently sit alone. The history of the Justice of the Peace, an historic and still important functionary, will be dealt with in a subsequent chapter. Justices of the Peace are appointed by the Lord Chancellor, acting on behalf of the Crown, to whose notice they are now recommended, Courts of Summary Jurisdiction

¹ Cf. Kenny, *Outlines of Criminal Law*, pp. 456-7, notes

in the case of county magistrates, by the Lord-Lieutenant, in the case of boroughs by local advisory committees, representative of all political parties¹

A large proportion of non-indictable offences, though technically criminal, are of a petty character, and 'consist mainly of breaches of municipal regulations made in the interests of the public safety, or health', and not involving 'violence, cruelty, or gross dishonesty'² Such cases are dealt with in Police Courts or Petty Sessions, which in large towns sit daily, and in smaller towns and country districts at frequent intervals. In these Courts justice is administered by magistrates who are for the most part unpaid. In counties, the chaumens of county and district councils, in boroughs, the mayor, and, for one year after vacating office, the ex-mayor, are ex-officio magistrates. In boroughs which have a separate Commission of the Peace there are, in addition to these two functionaries, borough magistrates whose jurisdiction is limited to the borough and who sit only in Petty Sessions. The county magistrates administer justice in two Courts—in Petty Sessions, as in boroughs, and in 'Quarter Sessions' which are held four times a year, and at which more serious offences are tried.

Petty
Sessions

All persons accused of crime are brought in the first instance before a magistrate or magistrates sitting in a Police Court or Petty Sessions. In all cases an 'information' or 'complaint' must be laid by some one who knows the facts. If the case be trivial, a *summons* to attend and answer the charge is issued by a magistrate. If the defendant fails to appear the case may be determined in his absence, or a *warrant* may be issued for his arrest. In grave cases a warrant is issued under the hand and seal of a magistrate or a judge of the King's Bench Division.

¹ The Lord-Lieutenants are now advised by similar committees. Formerly, borough magistrates were appointed on the recommendation of the Town Council, or other local bodies, but in many cases the appointments were frankly political.

² *Introduction to the Judicial (Criminal) Statistics for the year 1908*, p. 12, note (quoted by Alexander, *Administration of Justice*, p. 147).

Justices of the Peace, being as a rule laymen without special legal knowledge, must appoint a salaried clerk with legal qualifications to assist them in their judicial work. It is the duty of the clerk to advise the Justices on points of law, to take minutes of the proceedings, and in the case of indictable offences to take the depositions and to transmit them to the Director of Public Prosecutions, if the case is taken up by him, or to the Court of trial.

Magis-
trates'
Clerks

The relations of the lay Justice of the Peace and his expert adviser have for many centuries attracted the shafts of satire. Early in the seventeenth century Fletcher in *The Elder Brother* makes Miramont say to Bissac

Thou monstrous piece of ignorance in office!

Thou hast no more knowledge than thy Clerk infuses

Fielding makes the same point in *Tom Jones*, while the famous scene between Mr. Nupkins and his clerk Mr. Jinks is familiar to all readers of *Pickwick*. A distinguished American commentator on English institutions quotes the relation of Justice and Clerk in illustration of the thesis that the co-operation of professional and lay elements is one of the most outstanding and characteristic of existing political traditions in England. 'In order', he writes, 'to produce really good results, and avoid the dangers of inefficiency on the one hand and of bureaucracy on the other, it is necessary to have in any administration, a proper combination of experts and men of the world.' This combination is seen not only, as already noted, in the co-operation of parliamentary ministers and civil servants, but in that of judge and jury, and—with a reversal in the mutual relation of the two elements—in that of Justice and Clerk.¹

The Council of a Municipal Borough,² or indeed any 'populous place' of 25,000 inhabitants,³ may petition the Home Secretary to appoint one or more stipendiary magistrates. A stipendiary is paid by the borough,

Stipen-
diary
Magis-
trates

¹ A. L. Lowell, *The Government of England*, i. 173-5

² Under the Municipal Corporations Act, 1882

³ Stipendiary Magistrates Act, 1863

though he holds office during His Majesty's pleasure, he must be a barrister of seven years' standing, and becomes, by virtue of his office, a Justice of the Peace for the borough. Except for the fact, already stated, that a stipendiary is invested with the powers of two ordinary Justices and may consequently sit alone, the procedure of the Court is identical whether the magistrate be paid or unpaid. In the metropolis and in all the large boroughs summary jurisdiction is virtually entirely in the hands of stipendiary or 'Police Court' magistrates. Like unpaid Justices they cannot try, save in the cases already mentioned, persons accused of indictable offences, nor impose a sentence of more than six months' imprisonment. Justices of the Peace, paid and unpaid, are amenable to the control of the High Court of Justice. This control can be exercised in three ways. The High Court can, by a writ of *mandamus*, order the Justices to hear cases which are within their jurisdiction, or by a writ of *prohibition* can prevent them from interfering in matters beyond it, or by a writ of *certiorari* can call up any case in which there has been, or threatens to be, a failure of justice. In certain cases an appeal lies from Petty Sessions to Quarter Sessions on the facts, and to the High Court on points of law, but appeals, in proportion to the vast number of cases dealt with by the Courts of Summary Jurisdiction, are relatively rare.

The more serious—'indictable'—cases must be sent for trial to Quarter Sessions or to the High Court, and in the latter case must be 'presented' to the Superior Court by a Grand Jury. In such cases the function of the Inferior Court is merely of a preliminary character—to investigate the *prima facie* facts, and, in particular, to grant or refuse bail to the defendant.

The
Coroner

Another Court which makes preliminary investigations into cases of suspected crime is that of the Coroner. The Coroner's Office is one of great antiquity, having existed at least from the year 1194,¹ if not from an earlier date.²

¹ Stubbs, *Select Charters*, 260, § 20.
Select Coroners' Rolls, Introduction, pp. xv-xix.

The Coroner, though elected in the Shire Court, was primarily, as his name implied, the representative of the King 'He hath principally', writes Blackstone, 'to do with the pleas of the Crown—and in this light the Lord Chief Justice of the King's Bench is the principal Coroner in the kingdom and may (if he pleases) exercise the jurisdiction of a Coroner in any part of the realm'¹ There were usually four coroners in a county, though some counties had fewer. There are now three types of Coroners: County Coroners, who since 1889 are appointed by the County Council, Borough Coroners, who in the larger boroughs are appointed by the Borough Council, and certain 'Franchise' Coroners such as those for the University of Oxford and City of London. All judges of the High Court are *ex-officio* Coroners in any locality. The duty of a Coroner is to hold inquests, with the aid of a jury, into cases of sudden or suspicious death, and to look after treasure-trove. In the event of a verdict against some person accused of causing another's death the accused may be committed for trial on the warrant of the Coroner, but such committal does not, as a rule, supersede the preliminary investigation of the supposed crime before Justices of the Peace.

By an Act of 1362 the transformed Justices of the Peace were required to hold Quarterly Sessions for the discharge of their rapidly accumulating duties. With those duties, so far as they were administrative in character, a subsequent chapter will deal. From the first, however, an important part of the work in Quarter Sessions was judicial. That portion is still retained by the County magistrates and must, therefore, claim attention at this point. Quarter Sessions are also held in more than one hundred boroughs. In these latter Courts the sole judge is the Recorder. The Recorder is a professional lawyer, a barrister of not less than five years' standing, he is appointed by the Lord Chancellor and receives a small salary. Unlike County Court judges and stipendiary

Quarter
Sessions

magistrates, Recorders are not disqualified from sitting in Parliament, save for their own boroughs, nor from practice at the bar. The position, therefore, though not highly remunerated, is eagerly sought after by political barristers who are looking for promotion to the judicial bench. Quarter Sessions in counties are presided over by a chairman, who may or may not have legal qualifications, but who is frequently a layman.

The Clerk of the Peace Like the Justices in Petty Sessions the County magistrates in Quarter Sessions have the assistance of a trained legal adviser in the person of the Clerk of the Peace. This office is of great historic antiquity as well as of modern utility, dating back at least as far as the fourteenth century. The Clerk of the Peace keeps the records of Quarter Sessions, which is a Court of Record, and otherwise assists the magistrates in the discharge of their important judicial functions.

Jurisdiction of Quarter Sessions The jurisdiction of the Court is threefold. It can try all indictable offences committed to it for trial except such felonies as are punishable, on a first conviction, by death or penal servitude for life, and certain crimes such as libel, perjury, and forgery, which may involve difficult questions of law. Its appellate jurisdiction extends to all appeals from the convictions and orders of Courts of summary jurisdiction and to licensing appeals in licensing, rating, poor law, and similar non-criminal cases. It also possesses 'jurisdiction of a miscellaneous character, in certain miscellaneous cases, conferred by special statutes, e.g. the enrolment of certificates relating to the division or stopping up of highways, the granting of licences to keep private lunatic asylums (under the Lunacy Act 1891), &c.' ¹ Appeals are (with four exceptions) heard without a jury and are decided by the majority of Justices present. Cases which come before Quarter Sessions as a Court of First Instance must, on the contrary, be tried with a petty jury. The importance of the jurisdiction thus exercised may be judged by the fact that some three-quarters of the

¹ *Alexander, op cit*, p. 80 and *passim*.

criminal trials in England take place in borough and county sessions ¹

The apex of the administration of the Criminal Law is formed by the High Court of Justice, either in London or at Assizes. To this Court all the gravest offences must, as we have seen, be sent for trial. This Court in particular (though all Courts of Justice share it) represents the majesty of the King as the source or fount of justice. That is, indeed, the first and foundational principle on which English legal administration has from the first rested. But there is a second principle of almost equal significance that 'the suitors are the judges'. These two principles, at first sight contradictory, have in course of time been blended into the system with which we are familiar. The administration of justice must in primitive societies necessarily be mainly local. Hence the importance of the local Courts of the Shire and the Hundred to be presently described. In those popular or 'communal' courts the 'justice' is practically 'folk right', and is administered by the freemen themselves, or in technical phrase the 'suitors are the judges'. But against the maintenance of this idea two forces soon came to operate: the centralizing authority of the Crown, and the more immediate authority of the local territorial magnate: the force of feudalism. To some extent, however, in justice, as in government, these two forces cancelled out. Between royal justice and feudal justice there was more of antagonism than between royal justice and communal. Hence the stern insistence of the Norman and Angevin kings upon the attendance of the tenants-in-chief at the Shire Courts upon the rights of the Sheriff even as against the 'franchises' of the Barons.

The
Fount of
Justice

Under Henry I, still more systematically under Henry II, we see new machinery in operation. The Barons of the Exchequer, the King's Justices, go forth as Royal Commissioners to collect revenue and incidentally (at first) to

Historical
Develop-
ment of
the Ju-
diciary

¹ The Criminal Jurisdiction of Quarter Sessions has been considerably extended by the Criminal Justice Act, 15 & 16 Geo V, c. 86.

administer justice. Then first business is to hold 'Pleas of the Crown', to decide, that is, any suits in which the King is interested. Simultaneously the central *Curia* takes on a specialized organization. At first it is difficult to draw any line between legislative, administrative, and judicial work. Gradually the functions are differentiated and the *Curia Regis* (as distinct from the *Concilium Regis*) emerges specifically as a Court of Justice. Later still we perceive three divisions of this Court: (1) the King's Bench—the King's own Court, held *coram ipso domino Rege*—the Court which had jurisdiction in all criminal cases, and in all Pleas of the Crown, (2) the Court of Common Pleas, for the trial of all cases between subject and subject, and (3) the Court of Exchequer, dealing with all cases involving revenue. By the reign of Edward I, each of these Courts has its own staff of judges. But the parent *Concilium* has not parted with all judicial function. It still belongs to the King-in-Council to redress inequities in the working of his Courts, and to correct the errors of his judges. These two germinal ideas eventually give us the specialized Court of the Chancellor and the supreme appellate jurisdiction of the House of Lords.

To some extent these two Courts are in conflict. Between Parliament and the Council there was, as we have seen, a long and bitter struggle. Eventually the House of Lords finds its own work in correcting the errors in law of the ordinary Courts. Meanwhile, the Chancellor has been developing, side by side with the ordinary Courts but outside them, a jurisdiction of his own. It arises naturally from his function as Keeper of the King's Conscience. There are cases in which the application of strict rules of law will result in a denial of equity. Thus there is gradually evolved a system of equity, designed to supplement the deficiencies and to correct the inequities of the common law, thus the Court of Chancery has come into being. In time, particularly in the fifteenth century, and for reasons already explained, the Common Law Courts reveal weaknesses and deficiencies in the administration of criminal

justice. There is room for a Court of 'criminal equity' (if one may so phrase it), particularly for a Court strong enough to deal with powerful offenders. The King's Council is the obvious resource, and the regular exercise of criminal jurisdiction in the Court of the Star Chamber is the result. The many controversial questions as to the precise status of this Court are beyond the scope of this book. Clearly and indisputably, however, the Court of Star Chamber represents the jurisdiction of the Council, and by the Statute of 1641 the Council, as clearly, is deprived of it.

First, then, the Courts of Law enshrine the idea that the King in person is the source of justice, delegating the administration of it to whomsoever he will. But there is another root-idea of which it were unsafe not to take account. The 'suitors are the judges'. Justice is communal as well as royal. We must not dogmatically connect this idea with the institution of trial by jury, there are too many pitfalls in the path, communal justice is clearly a Teutonic principle, trial by jury is mainly the development of a Norman idea. But the latter seems in a sense to fulfil an instinct which was deep rooted in our English system long before the Conqueror landed at Pevensey.

Trial by Jury represents two distinct ideas. On the one hand, the obligation resting upon the lawful men of a particular district to bring before the King's Justices those who are suspected of crime, and, on the other, the ascertainment of facts by a process of inquest, by the sworn information of those who are personally cognizant of the facts. We can trace here the lineaments of our 'grand' and 'petty' juries. It is still the business of the legal men of the shire—of the county magistrates sitting as a 'grand jury'—to indict before the King's Judges the persons reasonably suspected of crime, to find against them 'a true bill'. The 'petty' jury were originally not judges of fact, but sworn witnesses. They represented a form of 'inquest' applied in the first instance to an ascertainment of the fiscal rights of the Crown. The facts

recorded in the Domesday Survey were obtained by commissioners, from sworn information laid before them by the men of the particular locality concerned. The procedure was subsequently adapted to many other purposes to the determination of questions of ownership, of obligations in regard to national defence, and ultimately to criminal investigations. The 'sworn men' were witnesses to facts. Later on, the original jury, imperfectly acquainted with the facts, were 'affoiced' by others who could speak to them from personal knowledge. Thus the 'jury' was gradually distinguished from 'witnesses'. Ultimately the divorce becomes complete. The jury must arrive at a decision as to the facts from the sworn testimony laid before them by witnesses and from that only. The Grand Jury of presentment, the Petty Jury empanelled to decide on the facts of the case, and the witnesses sworn to testify to the truth, the whole truth, and nothing but the truth, have still then several functions to perform.

Assizes The significance of these functions is brought home to the ordinary citizen most vividly by the periodical visits of the Judges of the High Court to the Assize towns. Now, as for centuries past, the King's Courts are partly stationary (*in banco*), partly itinerant. Equally in both cases the Judges represent the Sovereign, and their arrival at and stay in the several towns is consequently, and properly, attended by stately and impressive ceremonial. The Judges are technically Commissioners of oyer and terminer, gaol delivery and Assize, and their Commissions are for the counties comprised in the circuit, though all Judges of the Supreme Court are in the commission of the peace for all counties.

For the purpose of holding Sessions of the High Court in different localities, England and Wales are divided up into eight circuits. On each circuit there are at least two Assizes a year, in Manchester, Leeds, and Liverpool there are four. To each circuit one or sometimes two Judges are assigned to try criminal, and, where necessary, civil cases.

as well¹ In all criminal cases a 'true Bill' must first be found by the Grand Jury before an accused person can be put on his trial, while the question of guilt or innocence is subsequently decided by the petty jury of twelve persons whose verdict must be unanimous Whether the trial takes place before a Judge on circuit or in London the procedure is the same

Until the year 1907 there was technically no right of appeal in criminal cases The Home Secretary, exercising on behalf of the Sovereign the prerogative of mercy, possessed a power of revision which amounted to something like an appeal on matters of fact, while the Court for Crown Cases Reserved could quash a conviction, if a point of law reserved at the trial was decided in favour of the prisoner In 1907 a Court of Criminal Appeal consisting of two or more Judges of the High Court was established A convicted prisoner may now appeal on a question of law, or, by leave of the Court of Criminal Appeal or of the Judge who originally tried the case, he may appeal on a question of fact or mixed law and fact The Crown's prerogative of pardon, as exercised by the Home Secretary, remains in theory unaffected, in practice, however, many cases which were formerly reviewed at the Home Office now come before the Court of Criminal Appeal In the year 1922 there were 415 applications for leave to appeal, and of these the Court of Criminal Appeal heard or otherwise disposed of 86 In 17 cases the conviction was quashed, and in 28 cases the sentence was varied

Court of
Criminal
Appeal

We turn to the administration of Civil justice

The Civil Court to which there is easiest access is the 'County Court' These 'County Courts' are brand-new tribunals created under an Act of 1846, and must be carefully distinguished, therefore, from the historic Courts of the Shire or County, with which they have no sort of connexion For County Court purposes England is divided into some five hundred districts, in each of which a Court

County
Courts

¹ Additional powers for the regulation of Circuits have been granted to the Crown (acting by Order in Council) by the Supreme Court of Judicature (Consolidation) Act, 15 & 16 Geo V, c 49

is generally held every month. The districts are grouped into fifty-five circuits, to each of which as a rule a Judge is assigned, each Judge, therefore, is responsible on an average for ten districts. County Court Judges, who must be barristers of at least ten years' standing, are appointed and removable by the Lord Chancellor. Successive Acts have extended their powers so widely that these Courts are now competent to try almost any civil case (except breach of promise of marriage) which does not involve more than £100. They have equity jurisdiction in cases up to £500, Probate jurisdiction if the estate does not exceed £200 personalty and £300 realty, and Bankruptcy jurisdiction to any amount. They can wind up companies whose capital does not exceed £10,000, and some Courts have in certain cases Admiralty jurisdiction. If the amount at issue exceeds £5 either party may demand a jury of five persons, or the Judge may at his discretion allow a jury in cases involving a less amount.¹ These Courts are freely resorted to, for in them justice is promptly, efficiently, and cheaply administered. Hence there is a natural tendency still further to enlarge their competence. A plaintiff may, as a rule, elect whether he will proceed in the County or the High Court, but if the action is one which could legally be tried in the inferior Court, resort to the High Court is, by the rules as to costs, discouraged. In nearly all cases an appeal from the County to the High Court is allowed on questions of law, an appeal which may be carried stage by stage to the House of Lords. But having regard to the number of cases tried in County Courts—about 1,000,000 per year—appeals are comparatively rare,—a striking testimony to the satisfaction which is given to suitors by these Courts.

Local
Courts of
Record

Apart from the modern County Courts there still survive more than twenty local Courts of Record, with limited or local civil jurisdiction. Such Courts formerly existed in great numbers, particularly in the Counties Palatine of

¹ Holdsworth, *History of English Law*, 1 192

Chester, Durham, and Lancaster. Until 1830 Chester had a local Chief Justice and second Justice, but they were abolished in that year, and in 1873 the Judicature Act provided that the Counties Palatine of Lancaster and Durham should respectively cease to be Counties Palatine as regards the issue of commissions of assize or other like commissions, but no farther. The Chancery Court of the Duchy of Lancaster, however, not merely survives, but under the presidency of a Vice-Chancellor, appointed by the Chancellor of the Duchy, continues to perform important judicial functions in Lancashire. By an Act of 1890¹ the Palatine Court of Chancery was brought into closer relation with the judicial system of the country at large, it was given substantially the same jurisdiction as the Chancery Division of the High Court, and appeals from it were henceforward to go to the Court of Appeal (instead of as formerly to the Chancellor of the Duchy) and to the House of Lords.² The Chancery Court of Durham has also survived all reforms in the system of judicature, and, among other conspicuous instances of the survival of historic local Courts of Record, are the City of London Court, the Lord Mayor's Court, the Bristol Golsay Court, the Liverpool Court of Passage, and the Court of the Salford Hundred. 'Thus, except in those few cases in which a borough has an active Court of Record, the Courts of the boroughs, whether they are Courts of criminal or civil jurisdiction, have been assimilated to the local courts of the rest of the county.'³

It is, however, in regard to the superior Civil Courts that the simplification effected during the last quarter of the nineteenth century is most conspicuously seen. Down to 1873 there were eight superior Courts of First Instance: the King's Bench, the Common Pleas, the Court of Exchequer, the Chancery Court, the High Court of Admiralty, the Court of Bankruptcy, the Court of Probate,

Judica-
ture
Reform

¹ 53 & 54 Vict. c. 23.

Holdsworth, *A History of English Law*, 1, p. 117, and for local courts generally, and their decline, see chapters 11 of the same learned work.

² *Op. cit.*, p. 151.

and the Court for Divorce and Matrimonial Causes. Most of these Courts had separate staffs of judges.

Mainly by the Judicature Acts of 1873, 1875, 1876, and 1894, taken in conjunction with an important Order in Council of December 16, 1880, order has been evolved out of the chaos which, however suggestive to the student of history, was distracting to litigants and lamentably wasteful both of time and money.

The Supreme Court. There is now one Supreme Court of Judicature divided into (1), the High Court of Justice, and (2), the Court of Appeal. The former has three divisions.

(1) The King's Bench Division, which now exercises the jurisdiction formerly exercised by the Courts of King's Bench, Common Pleas, and Exchequer, and the Court of Bankruptcy. The Lord Chief Justice acts as President, assisted by a staff of seventeen puisne judges.

(2) The Chancery Division, under the Lord Chancellor and six puisne judges.

(3) The Probate, Divorce, and Admiralty Division, under a President and two puisne judges.

Questions of fact may, in Divisions (1) and (3), be referred to a jury at the instance of either party, and in division (2) with the leave of the judge. But except in the King's Bench Division jury actions are rare, and even there tend to become less frequent. The importance of the change effected by the Judicature Acts is thus summarized by Mailland: "To each of these divisions certain business is specially assigned. But this distribution of business is an utterly different thing from the old distinction between courts of law and of equity. Any division can now deal thoroughly with every action, it can recognize all rights whether they be of the kind known as "legal", or of the kind known as "equitable", it can give whatever relief English law (including "equity") has for the litigants."¹ It should, however, be observed that although a distribution of business is a very different thing from a distinction of jurisdiction, yet the suror who brings an action in the

¹ *Op cit*, p. 472

inappropriate Division finds to his cost that the distribution of business is still a real distinction.

To the High Court there is, in certain cases, an appeal from inferior Courts.

From the High Court (including Courts of Assize) an appeal lies in almost every case to the Court of Appeal. This Court now consists of certain *ex-officio* judges: the Lord Chancellor, any *ex-Lord* Chancellor, any Lord of Appeal in Ordinary,¹ the Lord Chief Justice of England, the Master of the Rolls, the President of the Probate Division, and five 'Lords Justices of Appeal'. *Ex-Lord* Chancellors, though *ex-officio* judges of appeal, can only be called upon to sit with their own consent at the request of the Chancellor.

From the Court of Appeal and from the Scotch Courts an appeal lies to the House of Lords—a tribunal the composition and procedure of which have been already described.

There remains yet another Court of Appeal in regard to which something must be said. The Act of the Long Parliament (1641) which abolished the Court of Star Chamber deprived the Privy Council of all jurisdiction in England, but the Council still remained the supreme Court of Appeal for admiralty cases and for all the King's oversea dominions. This remnant of jurisdiction was not at the time important, extending only to the Channel Islands, the Isle of Man, and the American 'plantations'. With the growth of oversea dominions it has, however, become far-reaching and highly important. In 1832 a further jurisdiction was conferred upon the King in Council. Henry VIII had created a Court of Delegates for hearing appeals from the Ecclesiastical Courts; Elizabeth a similar Court for admiralty appeals. These Courts were abolished in 1832, and their jurisdiction was transferred to the Privy Council.

The
Privy
Council

In the following year an important change was effected in the constitution of the Court which exercised the

¹ Holding certain qualifications, cf. Supreme Court of Judicature Act (1925), § 6

Judicial
Commit-
tee of the
Privy
Council

judicial functions of the Privy Council. Down to 1833 the work was in fact done by such members of the Council as had held high judicial office. But by an Act of that year (3 & 4 William IV, c. 41) the judicial work of the Council was transferred to a special Committee. This was to consist of the Lord President, the Lord Chancellor, and such other members of the Council as held or had held high judicial office. These were to include, in ecclesiastical cases, all the archbishops and bishops who were members of the Council. Under an Act of 1871 the Crown was empowered to appoint four paid members from among the judges of the High Court or the Chief Justices of the High Courts in Madras or Bombay, but then places have now been taken by the Lords of Appeal in Ordinary—the four ‘law lords’¹ designated by the Act of 1876 for the judicial work of the House of Lords. Under the same Act (1876) the archbishops and such bishops as are members of the Privy Council may be summoned, for the hearing of appeals in ecclesiastical cases, as assessors, but they are no longer members of the Committee. Subsequent Acts² have added to the Committee certain Canadian, Australian, and South African judges who are also members of the Privy Council. But, generally speaking, the composition of the Judicial Committee of the Privy Council is almost identical with that of the House of Lords sitting in a judicial capacity, and proposals have frequently been made for their amalgamation.

But there is an important difference in procedure. A judgement of the House of Lords is a quasi-legislative Act. A vote is taken and (if there be a division) the division list is published. The Judicial Committee, as befits a Committee of the Council, ‘advises’ the Crown. It is the King-in-Council by whom the Order, embodying the judgement, is formally made. The judgement of the Judicial Committee must, therefore, unlike that of the House of Lords, be unanimous, or at any rate dissent must not be

¹ Now (1925) 511
58 & 59 Vict., c. 44, and 3 & 4 Geo. V, c. 21

published. Moreover, while the latter is bound by its own decisions, the former is not.

Such is the machinery which now exists for the administration of justice in England. It is necessarily elaborate, but since 1873 it has been straightened out and simplified to an almost incredible extent, and it now operates, if not to the satisfaction of all suitors—an ideal impossible of attainment—at least to the admiration of those who are competent to express an expert opinion. Wherein the English system differs from that of some other countries will be indicated, in a general way, in the next chapter.

XXXIII THE JUDICIARY (3)

Some Comparisons The United States, Switzerland, and Germany

'The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office

'The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made under their authority, to all cases affecting ambassadors, other public ministers, and consuls, to all cases of admiralty and maritime jurisdiction, to controversies to which the United States shall be a party, to controversies between two or more States (between a State and citizens of another State), between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects'—*American Constitution, Art. III, §§ 1 and 2*

'The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a Monarchy it is an excellent barrier to the despotism of the prince, in a Republic it is a no less excellent barrier to the encroachments and oppressions of the legislative body'—HAMILTON, in the *Federalist*

'Je ne pense pas que jusqu'à présent aucune nation du monde ait constitué le pouvoir judiciaire de la même manière que les Américains'—De Tocqueville

'The highest Court of the United States holds a unique place in our form of Government, and one not found in any other governmental system. It wields a greater power than is exercised by any other judicial tribunal in the world'—EARL DRONE

THE legal system of England—the conception of law, the position of the Judiciary and the organization of the Courts—is, if not unique, at least *in genere*. In England, as we have seen, the Judges are, in exceptional degree, independent of the Executive, for all citizens, alike official and unofficial, there is but one law, and all have access to one and the same set of Courts, the Legislature

Law and
Justice in
England

is, indeed, sovereign and can override, though it cannot technically reverse, the decisions of the Courts, but the Judiciary is vested with immense power over the Executive. It was a principle of old Teutonic law that all officials should be subject to the law of the land in the same way as private individuals, and should be held responsible by the Courts for their actions committed without authority of law, whenever such actions caused damage to individuals.¹ This principle found its way into the English legal system—predominantly Teutonic in origin,—and members of the Administration have never been, on account of their official position, exempted in any way from the observance of the ordinary law of the land. Consequently the question to be decided by the Courts, whenever the act of an official came up before them, was one of jurisdiction. Did the law give the official the power to act as he had acted in the particular case, or not? It will at once be seen, as Professor Goodnow pertinently observes, 'what an enormous power the Courts had and have through the adoption of this principle over the acts of the administration. Any act of any officer may give rise to a complaint which the Courts have to decide. In deciding these complaints the Courts delimit the sphere of administrative competence in all its details in that they settle what is the jurisdiction of all officers of the Government.'² But, on the other hand, while officials are thus responsible to the ordinary law, the Sovereign is irresponsible—the King can do no wrong. The acceptance of this latter principle has, as the same acute critic points out, denied to the individual the right to sue the Crown, i. e. the Executive, except with its own consent. The only remedy open to the private citizen against the Crown is by the ancient procedure of *Petition of Right*. It lies with the Home Secretary and the Attorney-General to allow or refuse such a petition, but only if they allow it can the Courts entertain the action.

¹ Loening, *Deutsches Verwaltungsrecht*, pp. 771-84, cited by Goodnow, *Administrative Law*, II, 163.

² *Op. cit.*, II, 154-5.

The immense powers conferred upon the Executive during the Great War gave, as already indicated, to this procedure an additional significance, and the hardships which, in consequence, accrued to individuals have led a competent critic to declare that 'the remedies of the subject against the State in France are easier, speedier, and infinitely cheaper than they are in England to-day'.¹ The impression made upon a legal mind by an Executive temporarily invested with quasi-dictatorial powers may perhaps have induced to over-hasty generalization from a transitory situation. Yet, thirty years earlier, Professor Goodnow had observed that France—the home of Administrative Law—was singular in recognizing a direct remedy against the general acts of the heads of departments. In France any subject may appeal to the Council of State to have an objectionable ordinance quashed, on the ground that it has been issued by the head of a department in excess of his powers. In most countries there is a remedy against the special acts of the Executive. But while in France such an appeal goes to the Council of State, acting as an Administrative Court, in England and the United States the remedy is found in an appeal to the ordinary Courts.² English and American students will, however, be well advised not to be too quick in concluding that the liberties of their nationals are, on this account, more effectively safeguarded.

Such considerations would seem to suggest that, in order to appreciate more clearly the peculiar characteristic of the English system of law and justice, it may be advantageous to describe in broad outline the systems which prevail in some other typical States of the modern world.

Comparisons will, however, serve only to mislead unless it is constantly borne in mind that the conditions of the problem differ widely in unitary and infederal States, in States where the Constitution is rigid and in States where it is flexible, and, above all, in States which have, and

Compari-
sons and
contrasts

¹ C. K. Allen, 'Bureaucracy Triumphant' (*Quarterly Review*, No. 477, p. 247).

² Goodnow, *op. cit.*, 1 158-9.

those which have not, adopted the principles of the *Droit administratif*

Reference will first be made to three States which are alike in the possession of federal Constitutions, but wherein Federalism has assumed widely different forms

The
Judiciary
in the
United
States

De Tocqueville declared that no nation in the world has ever constituted its judiciary in the same way as the United States, and De Tocqueville's great authority has gone far to stereotype the impression that of all parts of the American Constitution the Judiciary is the most original and most interesting. Nor can any student of American Institutions fail to be struck alike by the dignity which attaches to the Supreme Court and by the significant functions assigned to it by the Constitution. The fathers of the American Constitution, deeply imbued, as we have seen, with the philosophy of Montesquieu, emphasized the importance of separating the 'power of judging' from the legislative and executive powers. They were, moreover, concerned to draft the terms of a Treaty, almost international in character, which should to all time secure the rights of the several parties thereto. To whom if not to the Judges was the interpretation of those terms and the enforcement of those rights to be entrusted? Thus the power of the Judicature arose naturally out of the circumstances under which the federal Constitution was framed. None the less is it necessary to insist that the principles at the root of the judicial system of the United States are essentially and demonstrably English in origin. The whole conception of American law is in conformity with the English idea that law is the embodiment of justice and the guardian of liberty, but that personal rights and political liberties are of no avail unless there exists a sanction, an appropriate machinery, by which they can be enforced. *Ubi ius ibi remedium* this principle is at the root of the English legal system, it is at the root also of the American. The difference between the two lies in the application of the principle, and it arises largely from the necessary implications of Federalism—a sacrosanct *Institu-*

ment, or written Constitution, the precise definition and rigid separation of powers, and the need for an authoritative interpreter of the Constitution and a guardian of the powers thereby distributed

The Constitution itself (Article vi, § 2) decrees as follows 'This Constitution and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land' Only those laws, it will be noted, which are made *in pursuance of the Constitution* form part of the supreme law of the land Thus, as Chief Justice Marshall stated in a famous judgement, in the case of *Hylton v United States* (1803), 'the particular phrasology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that the Courts as well as other departments are bound by that instrument' With equal clearness that great judge laid down the limits of the legislative authority of Congress 'Between these alternatives there is no middle ground The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts is alterable when the legislature shall please to alter it If the former part of the alternative be true, then a legislative act, contrary to the Constitution, is not law, if the latter part be true, then written Constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable'¹

The judgement of Marshall has never been impugned, and is now wrought into the very texture of the American Constitution

The more important provisions of the Constitution, in reference to the Judiciary, are as follows

ARTICLE III

Section 1 The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish The

¹ *Marbury v Madison*

judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office

Section 2 (1) The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority, to all cases affecting ambassadors, other public ministers, and consuls, to all cases of admiralty and maritime jurisdiction, to controversies to which the United States shall be a party, to controversies between two or more States (between a State and citizens of another State), between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof, and foreign States, citizens or subjects

(2) With all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make

The words placed between brackets were, however, limited by the eleventh amendment (1798), which runs 'The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State'

It will be observed that the Constitution does not, as is sometimes loosely said, 'create the Courts'. It provides that Courts there shall be, and that they shall exercise a certain jurisdiction. But it remains for the Legislature to fix by statute the number and remuneration of the Judges of the Supreme Court, and for the President with the advice and consent of the Senate to appoint them. Thus, as an American writer has recently pointed out, it is possible, since the organization and composition of the

Court are dependent upon Congress and the President, for Congress to increase the number of Judges, and with the connivance of the President to 'pack' the Court so that a majority out of sympathy with Congress might be overborne. Or, on the other hand, Congress may, as it did during the administration of Johnson, enact that vacancies should not be filled, and thus reduce the number of justices.¹ But, after all, the tenure of Congress is brief, that of the justices is, generally speaking, lifelong. The reduction of numbers could, therefore, only be accomplished by a process extending over several Congresses, while an attempt to 'pack' the Bench would almost certainly attract very unfavourable attention.

The federal judicial system consists of three parts: the District Courts, the Circuit Court of Appeals, and the Supreme Court, and in addition there are several special courts.

The
Federal
Courts

The Supreme Court, as at present constituted, consists of a Chief Justice and eight associate justices. Its Sessions are held annually in the city of Washington and begin on the second Monday of each October. Six justices constitute a quorum. The jurisdiction of the Supreme Court rests partly, as we have seen, upon the provisions of the Constitutional instrument, but much more upon statute. Its original jurisdiction is determined by the Constitution and includes only cases in which either ambassadors or States are parties; its appellate jurisdiction is determined mainly by statute, and includes all cases from State Courts involving conflicts between State Law and Federal Law, all cases involving the interpretation of the Federal Constitution or any Federal Law or Treaty, cases involving a conflict between a State Constitution and the Constitution of the United States, and all cases where the decision of the Circuit Court of Appeals is not final. Appeals also lie under certain conditions to the Supreme Court from the Court of Customs Appeals, the Court of Claims, from the District Court when sitting as a Prize

The
Supreme
Court

¹ Kimball, *op cit.*, p. 179

Court, and from the District Courts of the Philippine Islands, Hawaii, and certain other District Courts. The judicial power of the Federal Government, as Mr Woodrow Wilson has pointed out, is thus made to embrace two distinct classes of cases on the one hand, those in which, by reason of the nature of the questions involved, it is manifestly proper that the authority of the Federal Government, rather than the authority of a State, should prevail in particular, admiralty and maritime cases, cases arising out of the constitutional laws or treaties of the United States, or out of conflicting grants made by different States, and, on the other hand, those in which, by reason of the nature of the parties to the suit, the State Courts could not properly be allowed jurisdiction, as for instance cases affecting foreign ambassadors or the citizens of different States¹

The Circuit Court of Appeals Below the Supreme Court there formerly existed two sets of Circuit Courts, for which purpose the United States was divided into nine circuits, to each of which a Judge of the Supreme Court was assigned. Each Judge was required to hold two circuits a year, but the duty was found intolerable, and in 1869 nine Circuit Justices were appointed. In 1911, however, the ordinary work of the Circuit Courts was handed over to the District Court, and there was established in each circuit a Circuit Court of Appeals. This tribunal consists of Circuit Judges, Judges of the District Court, and Justices of the Supreme Court, but in practice the latter never attend. The Court has appellate jurisdiction over all cases decided by the District Court, except certain classes of cases which have to be carried directly to the Supreme Court.

District Courts Lowest in the series of Federal Courts is that of the District. For this purpose the United States is divided into eighty-one districts, each State constitutes at least one district, and the larger States are subdivided into several. The District Judges, like those of the other Federal Courts, are appointed by the President of the

¹ *The State*, § 1307

United States with the advice and consent of the Senate. In addition there is in every district a Federal District Attorney, or Public Prosecutor, who acts under the direction of the Attorney-General of the United States. The executive officer of the District Court is a United States Marshal who acts as the Federal Sheriff and executes with his assistants all the orders and processes of the District Courts. The Marshal may, if necessary, call upon the military force of the United States to assist him in the execution of his duties.

With the exception of the cases reserved for the Supreme Court, the District Court has original jurisdiction in all civil and criminal cases arising under the Federal Laws.

Of the functions performed by the Supreme Court the most interesting remains to be noticed, and in view of the contrast between the position of the Judiciary in America and England respectively it must be analysed with some precision. The contrast arises, as already hinted, from the essential difference between a federal and a unitary Constitution. In a federal Constitution it is essential not only that the Constitution should be above the law, or at least above the ordinary law, but also that authority should be given to the Courts to act as interpreters of the Constitution. In England the Judges are never called upon to interpret the Constitution, they have only to interpret the law. In America, on the contrary, they are required to determine the legality of the law itself. An English Court may hold the opinion that in enacting a particular law the Legislature acted with conspicuous folly. But any such opinion they must keep to themselves, it is no part of their business to express it, still less to act upon it. Least of all are they called upon to decide whether the Legislature was legally competent to enact it. No such question can, with us, possibly arise, for the simple reason that in England there are no limits to the legal competence of Parliament.

In America, on the other hand, the Judges are constantly called upon not merely to *interpret* a given law, but to

The
Supreme
Court and
the Con-
stitution

decide whether the law is law, that is, whether the Legislature in enacting it acted within the limits of the power assigned to it by the Constitution. In other words, the judges are actually guardians of the Constitution. Lest a purist should take exception to this description it is desirable to explain precisely the sense in which the Judges of the Supreme Court act as 'guardians' or interpreters of the Constitution.

The Court never presumes to act in this capacity on its own initiative, it can do so only when in the ordinary course a case is brought before it. 'The Court', says Mr. Eaton Drone, 'has authority to expound the Constitution only in cases presented to it for adjudication. Its judges may see the President usurping powers that do not belong to him, Congress exercising functions it is forbidden to exercise, a State asserting rights denied to it. The Court has no authority to interfere until its office is invoked in a case submitted to it in the manner prescribed by law'.¹ In other words the function of the Court is purely judicial. Lord Bryce, therefore, was clearly right in affirming that the duty of American Judges 'is as strictly confined to the interpretation of laws cited to them as it is in England or France'. Such a statement, however, if it stood alone would give an erroneous impression of the position of the American Judiciary. Lord Bryce himself supplies the necessary corrective by pointing out that whereas in England there is only one law for the Judges to interpret, or rather that all laws are of equal validity, in America there are four different kinds of law possessing varying degrees of authority. Stated in order of authority they are (1) the Federal Constitution, (2) Federal Statutes, (3) State Constitutions, and (4) State Statutes. Of these the first prevails against all the rest. Technically, therefore, the function of the Judges is to interpret the law of the Constitution. But on that interpretation depends the question as to the validity of other laws. 'The only question they have to consider', says Mr. Eaton Drone,

¹ *Forum*, Feb. 1890.

' is whether the power in dispute is granted or withheld by the Constitution. It is not for them to say whether the grant or the denial is a defect in the Constitution. . . . The judges may regard the law under consideration as highly beneficial. If they think it contrary to the Constitution they must declare it void. They may look upon it as mischievous, tyrannical, or dangerous. If they find it warranted by the Constitution they are bound to pronounce it valid. They are not to consider whether the effect of their decision will be to annul a good law, or to uphold a bad one. That is the theory of the judicial function.'¹

Nevertheless, desirable though it has seemed to define that function strictly, it remains true that in effect the judges do act as guardians of the Constitution against the possible assaults of the Executive or the Legislature. It is, indeed, possible that a law which was enacted in contravention of the Constitution may remain law, provided that no question as to its legality is raised before the Courts, but such a contingency would mean the assent or acquiescence of every individual citizen of the United States, and is too remote for serious consideration.

The broad contrast remains therefore true: in England the judges can under no circumstances entertain the question as to the competence of the Legislature to enact a given law. If it is on the Statute-book it is binding on them until it is amended or repealed. In America the judges are constantly compelled to entertain this question; they must ask not merely whether the law is on the Statute-book, but whether it has a right to be there. The distinction is fundamental. It is true that in both cases the Court is performing a judicial function; that in both cases it is interpreting law; but in England it has only one law to interpret, in America it must have two and may have four.

There are probably many laws upon the Statute-book in America the provisions of which, if challenged, would be

¹ *Forum*, p. 657.

pronounced *ultra vires*, and therefore invalid by the Courts. So long as they are unchallenged they are cheerfully obeyed. Nor is it the duty of the Courts to interfere. Their function is in no sense revisional but purely judicial to act, indeed, as interpreters of the Constitution. The only difference, indeed, between the English Courts and the Federal Courts is that in England all laws are of equal validity, whereas in America there are four different kinds of law, with four graduated degrees of authority. The Federal Constitution prevails, in the event of conflict, over all other laws, Federal Statutes, if within the competence of the Federal Legislature, prevail alike over State Constitutions and State Statutes, the State Constitutions prevail over State Statutes.

The Supreme Court cannot, then, in strictness be said to possess or exercise a 'veto' upon unconstitutional legislation but by the mere function of interpretation it has exercised a tremendous influence upon the course of legislation.

Down to the year 1911 no fewer than 1,183 cases involving the Constitutionality of a Federal or State Statute came before the Supreme Court. In 279 cases the objection was upheld, in 904 it was dismissed. Out of 218 cases involving the validity of Federal Laws, the validity of the statute has been upheld in 185, or nearly 85 per cent. State Statutes or municipal ordinances came before the Court in 965 cases, and in 719, or over 74 per cent, were upheld. Those figures do not tend to substantiate the charge, not infrequently preferred, that the Judges have attempted to dominate the sphere of legislation. Jefferson, in the virulence of his antagonism to Marshall, lent the weight of his authority to this aspersion. 'The Judiciary of the United States', he said, 'is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our constitutional fabric.' This is the language of the political partisan, obstructed in the pursuit of party ends by the wise provisions of the Constitution. The foundations of the Constitutional fabric were,

as Jefferson knew well, laid far too deep and broad to encourage the efforts or permit the success of unscrupulous sappers. The exercise of power was, under the Constitution, carefully distributed, but the ultimate repository was and is the sovereign people.¹

To that tribunal Legislature and Judiciary are alike accountable. The Legislature may exceed its powers in the enactment of laws ; the Judiciary may declare their invalidity ; but the ultimate decision rests with the people.

On the whole, thanks to the sagacious prevision of the fathers of the Constitution, and thanks not less to the legal-mindedness of the American people, the system has worked with conspicuous smoothness and success. The independence of the Judiciary was one of the cardinal tenets of Hamilton and his colleagues, and their insistence upon the principle has been more than justified in the event. The appointment of the judges, as already indicated, rests with the President, subject to the sanction of the Senate ; but once appointed they hold office for life, being removable only by impeachment. Resort to this procedure has been rare, and still more rarely successful. Only once has a judge of the Supreme Court been impeached, and then without success. Two federal judges have been convicted and removed ; some have resigned rather than face impeachment, and in one case the method was adopted as the only means of removing a judge who had become insane. In view of the all-pervasiveness of party politics in patronage, a pervasiveness from which not even the judicial sphere is exempt, this record, it must be conceded, is in the highest degree creditable to the legal profession in the United States.

One other feature of the Federal Judiciary calls for brief notice. The Federal Courts, like the Federal Laws, operate directly upon the individual citizens. In Switzerland, as will be seen, there is no immediate contact between the

¹ On the whole subject of B. F. Moore, *The Supreme Court and Unconstitutional Legislation*, quoted by Kimball, *op. cit.*, co xv and xvi *passim*.

organs of the Federal Government and the citizens, the carrying out of the laws and decrees made by the National Council being entrusted, as in Germany, to the cantonal administrators and Courts of Justice. But in America the Federal Courts, constituting a complete judicial hierarchy, are equipped with powers sufficient to compel obedience to the laws embodied in the Constitution or enacted by Congress. In particular, the Supreme Court occupies a position of unique authority, and probably, as an American jurist maintains, 'wields a power greater than is exercised by any other judicial tribunal in the world'.¹

The State
Courts

The administration of federal justice leaves little to be desired, but unfortunately the case is far otherwise in the several States of the American Union. So great, however, is the variety which exists among the laws of the several States regarding the constitution and function of the State Courts, that, as Mr. Wilson has pointed out, a generalized description is difficult. One general observation is nevertheless called for, the State Courts are wholly distinct from the Federal Courts, the bifurcation of judicial administration being absolute and complete. Each State has its own series of Courts, and appeals from those Courts to the Federal Courts of the United States lie, as we have seen, only in cases involving Federal Law, or in cases where one of the parties to the suits belongs to a different State.

There are, as a rule, four grades of jurisdiction, with corresponding Courts in each State. (1) Justices of the Peace, and Mayors' Courts, which roughly correspond to Petty Sessions and Police Courts in England, (2) County or Municipal Courts which hear appeals from the Courts of summary jurisdiction, and exercise original jurisdiction in civil and criminal cases of greater though not of the greatest importance. These may be said roughly to correspond to Quarter Sessions in England, and indeed in New York, New Jersey, and Kentucky, the English name of Quarter Sessions is retained, (3) Superior Courts, which again hear appeals from the inferior Courts already

¹ Eaton Done, *ap The Forum*, February 1890

described, and possess original jurisdiction in civil and criminal cases of more important character, and finally (4) Supreme Courts which, as a rule, have only appellate jurisdiction. In addition, all the States have Equity Courts and most of them have special Probate Courts, though in some probate jurisdiction is left to the ordinary Courts of Law.

In the great majority of States the judges of every grade are directly elected by the citizens, in seven States they are appointed by the Governor with the approval of the Legislature or the Council, in four they are elected by the State Legislature. The tenure of judges varies from two years up to life tenure during good behaviour, but as a rule the tenure is short. Salaries, like tenures, vary greatly, but, as a rule, are on a relatively low scale and much below the incomes made by the best lawyers in private practice. The quality of the judges in most States is, therefore, not conspicuously high. Low salaries, short tenure, and election by a popular vote on a party ticket, combine to exclude from the judicial bench, in the majority of States, lawyers of eminence. Lord Bryce goes farther in his condemnation of the system. 'In some States', he writes, 'it is not only the learning and ability but also honesty and impartiality that are lacking. In some States of the American Union the bench is now and then discredited by the presence of men known to have been elected by the influence of great incorporated companies or to be under the control of powerful politicians, and there are cities where some lawyers have made a reputation for fixing a jury'.¹

Bad as is the effect of the election of judges upon civil justice, it is even worse upon criminal justice. Ex-President Taft has pointed to the lax 'enforcement of criminal law as one of the greatest evils from which the people of the United States suffer', while Lord Bryce, a more indulgent critic of all things American, has declared that with few exceptions criminal procedure is 'cumbersome and

State
Judges

¹ *Modern Democracies*, II, pp. 424 and 526

regrettably ineffective' 'Trials', he says, 'are of inordinate length, and when the verdict has been given, months or years may elapse before the sentence can be carried into effect. Many offenders escape whom everybody knows to be guilty, and the deterrent effect of punishment is correspondingly reduced.'¹

The election of judges is not, however, the worst feature of the administration of justice in the States. Even more disastrous in its effect upon the impartiality of the judicial bench is the application of the principle of the Recall both to the judges themselves and to their decisions. The principle is not applied only to judges; in ten States it is applied to all elective officers except judges; in six States it is applied to the judges as well. The working of the principle is thus described by Mr. Elhu Root

'If a specified proportion of the voters are dissatisfied with the judge's decision they are empowered to require that at the next election, or at a special election called for that purpose, the question shall be presented to the electors whether the judge shall be permitted to continue in office or some other specified person shall be substituted in his place. Thus, ordeal differs radically from the popular judgement which a judge is called upon to meet at the end of his term of office, however short that may be, because when his term has expired, he is judged upon his general course of conduct while he has been in office and stands or falls upon that as a whole. Under the Recall a judge may be brought to the Bar of public judgement immediately upon the rendering of a particular decision which excites public interest and he will be subject to punishment if that decision is unpopular.'

The effect of such a device cannot be doubtful. Judges will naturally play for safety and popularity, they will, as Mr. Root insists, 'hear and decide cases with a stronger incentive to avoid condemnation themselves than to do justice to the litigant or to the accused'. That highest duty of the judicial power, to extend the protection of the law to the weak, the friendless, the unpopular, will in

¹ *Op. cit.*, II, p. 95

a great measure fail. Indirectly the effect will be to prevent the enforcement of the essential limitations upon official power because the judges will be afraid to declare that there is a violation when the violation is to accomplish some popular object.' Thus, however, does not exhaust the disadvantages of the principle of Recall. One State, Colorado, has gone beyond the Recall of the judges to a so-called Recall of decisions. This is intended to apply in particular to cases in which the Courts have decided that a given law is in violation of one of the fundamental rules of limitation prescribed in the Constitution. The idea is that if public feeling runs strongly in favour of the law, and in favour, therefore, of disregarding the constitutional limitation in the particular case, the question shall be submitted to a plebiscite. If the people decide that the law shall stand despite the decision of the Court that it violates the Constitution, stand it will. The exercise of such a power would, as Mr. Root justly observes, strike at the very foundation of the whole system of American Government. The inalienable rights with which according to the Declaration of Independence all men are endowed, are not, as he finely says,

' derived from any majority. They are not disposable by any majority. They are superior to all majority. The most friendless and lonely human being on American soil holds his right to life and liberty and the pursuit of happiness and all that goes to make them up, by title indefeasible against the world, and it is the glory of American self-government that by the limitation of the Constitution we have protected that right even against ourselves. The makers of our Constitution, wise and earnest students of history and of life, discerned the great truth that self-restraint is the supreme necessity and the supreme virtue of democracy.'¹

For a foreigner to attempt to emphasize a judgement so impressive would be little short of an impertinence, although Lord Bryce did venture, following the best American commentators, to describe the popular election

¹ *Experiments in Government and the Essentials of the Constitution* Princeton, 1913

of judges as an 'indefensible system'. Even less defensible is the Recall of judges so elected, and least defensible of all is a popular veto upon their decisions in individual cases.

We must conclude, then, that the administration of justice in the States of the American Union contrasts very disadvantageously with the work of the Federal Judiciary. The latter, as we have seen, is admirably done; the former, in the judgement alike of native and of alien critics, calls insistently for amendment.

Switzerland

From the American Commonwealth it is an easy step to the Helvetic Republic. The Federalism of Switzerland is, however, of a different type from that of the United States, and the difference is most clearly reflected in their respective arrangements for the administration of justice. The Swiss polity differs also from the American in that it contains a considerable infusion of the principles of Administrative Law, though the infusion is much weaker than in France. There are, indeed, no special administrative tribunals in Switzerland, but a considerable amount of administrative jurisdiction is vested in the Federal Council.

The Federal Council

It will be remembered that, except in regard to foreign and military affairs, to customs, posts, telegraphs, and telephones, the Federal Council has no direct executive authority.¹ Ordinary federal laws and the judgements of the Federal Court are carried out by the Cantonal authorities, though they are executed under the control and supervision of the Federal Council. In its judicial capacity the Council deals with a large class of administrative questions which are, under the terms of the Constitution, excluded from the competence of the Federal Tribunal. It is provided, however, that from the Council an appeal should lie to the Federal Assembly.²

The Federal Court

The Constitution further provides for a Federal Tribunal

¹ *Supra*, Book II, chapter IV.

² Article 85, Section 12, Article 102, Section 2.

(*Bundesgericht*) This Court now consists of twenty-four judges, with an equal number of substitutes, who are appointed by the Federal Assembly (i.e. the two houses of the Legislature sitting as a single chamber), which, in making its appointments, must have regard to the three national languages—German, French, and Italian. Judges may not, during their term of office, engage in any other employment either Federal or Cantonal. They are appointed for six years, but are re-eligible, and like the members of the Federal Council, are so generally re-appointed that they may be said to enjoy a life tenure subject to good behaviour. Each judge receives a salary of £600 a year, and the President of the Court has an additional £40 a year. Perhaps as a concession to the French-speaking Cantons, perhaps in order to separate the judicial from the legislative function, the Federal Court is located at Lausanne while the political capital is at Bern.

The Court exercises both criminal and civil jurisdiction. As a criminal Court the judges sit with a jury. The country is divided for purposes of criminal justice into five Assize districts, and a section of the Federal Court is assigned to each. The competence of the Court in criminal matters is, however, severely restricted, and in fact its functions are rarely exercised.

JURIS-
DICTION

The civil competence of the Court is much more extensive, and, in accordance with the discretion given by the Constitution, has been greatly enlarged by legislation. It acts as a Court of Appeal from the Cantonal Courts in all cases arising under Federal Law, if the amount at issue exceeds three thousand francs; it has primary jurisdiction in all suits between the Confederation and the Cantons, between Canton and Canton, and between private citizens and the Government, Federal and Cantonal alike. The main function of the Court according to Swiss jurists is, however, the exposition of public law, or constitutional questions, and the determination of conflicts of jurisdiction either between Canton and Canton, or between the Federal Government and one of the Cantons. But it must again be

emphasized that the Federal Court operates in isolation it is not, like the Supreme Court of the United States, the apex of a judicial hierarchy, there are no inferior Federal Courts and the Federal Tribunal has no staff to which it can entrust the execution of its judgements. Not is it only in this respect that the Federal Court of Switzerland is at a disadvantage as compared with the Supreme Court of the United States. Emphasis has already been laid on the importance of the functions of the Supreme Court as the guardian or interpreter of the American Constitution. No such function is assigned to the Federal Tribunal, which under the Constitution (Article 13) is bound to apply all laws made by the Federal Assembly. Dr Dubs, an eminent Swiss jurist and for many years a member of the Tribunal, deplors on the one hand its limited competence in constitutional matters, and on the other the extension of its ordinary civil jurisdiction. Regarding the exposition of public law as the primary duty of the Federal Tribunal, he holds that the increase of its civil jurisdiction has tended to obscure the real purpose and alter the essential character of the Court. Dr Lowell has, however, justly observed that the existence of a general referendum in Switzerland renders it hardly possible for the Federal Court to exercise the powers which by general consent are entrusted to the Supreme Court of the United States. To the American citizen the Constitution, as Dr Lowell points out, is 'something more sacred and enduring than ordinary laws, something that derives its force from a higher authority'. With a referendum in general operation there would cease to be any reason for considering one law more sacred than another, and the Supreme Court would almost inevitably lose the power, denied to the Federal Tribunal in Switzerland, to pass judgement upon the constitutionality of statutes.¹ Finally, the Federal Tribunal is inferior to the Supreme Court in its inability to decide the question of its own competence. The most serious restriction upon its practical jurisdiction arises, however, from the general

¹ *Op cit*, II 219, 297.

inclination of the Swiss Constitution, and still more of the historic traditions of the Swiss peoples, to maintain in judicial, as in other matters, the independence of the Cantons

The Cantons are entitled under the Federal Constitution to organize their judiciaries as they please. Considerable variety therefore prevails, but generally speaking there are, in all except the smallest Cantons, three sets of Courts. (1) The Justices of the Peace, whose primary duty it is to act as mediators in legal disputes, and who exercise magisterial functions only when their mediation fails, (2) District Courts, or Courts of First Instance, (3) Supreme Cantonal Courts of Appeal. Zurich and Geneva have special Commercial Courts, and in some of the larger Cantons, including the two named, there are special Cassation Courts as well. The judges of the inferior Courts are as a rule directly elected by the people, the judges of the Supreme Courts are appointed by the Great Council of the Canton. They are generally appointed for short terms—three, four, or six years, but are generally re-elected. Salaries are low, but Cantonal judges are generally men of high character, if not of great legal attainments, and are fully competent to administer the rough-and-ready justice which is acceptable to the Swiss peasant. Juries are rarely empanelled in civil cases, and only in the graver cases in criminal trials. Generally speaking, it may be said that throughout the Confederation law is administered with a minimum of friction, and public order is well maintained.

The
Cantonal
Courts

From Switzerland we pass to Germany. The position of the Judiciary in Germany is largely determined by the peculiarities of German Federalism. Recent events have tended if not to obliterate at least to mitigate those peculiarities, but it still remains true that, as compared with the United States, Austria, or Switzerland, German Federalism is of an imperfect type. From the point of view of essential federal principles, the German Constitu-

Germany

tion, though in a less degree now than formerly, is vitiated by the predominance of one of the component States. Traces of Bismarck's grim resolution that Prussia should not be absorbed in Germany are still apparent in the constitutional arrangements of the German *Reich*.¹ The peculiarity of German Federalism under the Empire was the combination of administrative decentralization with legislative centralization. The Federal Legislature is responsible in large measure for the making of laws, the component States are responsible for their execution. The general tendency of the new Constitution is to reduce the power and responsibility of the component States, now to be known as *Länder*, and to increase that of the Central Government, but the essential characteristics of the Constitution remain unchanged. In addition to the *Reichsgericht*, which remains the Supreme Court for ordinary cases, there was established in 1921 the *Staatsgerichtshof* to try impeachments against the President and ministers, and to decide questions arising under the Constitution.

According to the new German Constitution (Section VII) justice is ordinarily to be administered through the Court of the Realm and the Courts of the *Länder*. Judges are to be appointed for life, and may not be deposed except in consequence of a judicial decision, though the Governments of the *Länder* may require judges to transfer their services to another bench. Extraordinary Courts are forbidden, and Military Courts of honour are abolished. Military and Naval Courts are abolished except in time of war. Every citizen has the right to demand that he be produced before the competent Court. Judges are to be independent and subject only to the law.

These principles are to apply both in the *Reich* and in

¹ The title both of the new German Republic and its component States was the subject of acute controversy in the Constituent Assembly at Weimar. Eventually *Reich* (the existing title of the Empire) was retained in preference to *Bund* for the former, and *Land* was adopted in preference to *Mitglied* for the latter. *Reich* is untranslatable. 'Empire' would be repudiated, 'Republic' would be incorrect, though Article I of the Constitution runs: 'The German Reich is a Republic.'

the component Lands. Provision is, however, made for the setting up by legislation of Administrative Courts both in the Reich and in the Lands, though it is noticeable that such Courts are to be set up 'for the protection of the individual against decrees and ordinances of the administrative authority' (Article 107). The precise significance of this limitation will be considered later when we come to deal with the Administrative Tribunals of France. It may here suffice to say that the principle of Administrative Law is deeply imbedded in the traditions both of the German Government and of the German people. The Federal Administrative Courts under the Empire, though numerous, possessed a limited jurisdiction, being confined severally to the decision of a certain class of cases, and generally acting in an executive as well as a judicial capacity. Among them may be mentioned the Imperial Poor Law Board, the Imperial Railway Court, the Imperial Fortress Belt Commission, and the Imperial Superior Marine Office. In Prussia, however, and in other States, there were Administrative Courts of First Instance and of Appeal. They were based generally upon the French plan and the position of such Courts may therefore be more conveniently considered in relation to France.

XXXIV THE JUDICIARY (4)

Law and Justice in France

'When a man travels in France he changes laws almost as often as he changes horses'—VOI RAIR

'The [French] Executive inherits a very absolute tradition of power'—WOODROW WILSON

'On a subi l'influence de ce préjugé dominant chez les gouvernants, dans l'administration, et même chez la plupart des juriconsultes, que les agents judiciaires sont les ennemis des agents administratifs'—JAZE, *Les Principes généraux du Droit Administratif*

'The development of French administrative law in the last century has been very much more in favour of the subject than of the administration. The remedies of the subject against the State in France are easier, speedier, and infinitely cheaper than they are in England to-day. It has become a maxim of constitutionalists, and a bulwark of French democracy, that the Conseil d'État is the great buffer between the public and the bureaucrat'—C. K. ALLEN

'The slightly increasing likeness between the official law of England and the *droit administratif* of France must not conceal the fact that the *droit administratif* still contains ideas foreign to English convictions with regard to the rule of law, and especially with regard to the supremacy of the ordinary Law Courts'—DICEY, *Intro.* to 8th Edition (1915)

IN the administration of justice, as in other spheres of Government, the United States, Switzerland, and Germany offer a striking contrast to England. But in the case of these States the contrast arises primarily from the fact that, while England possesses a Constitution technically unitarian, their Constitutions are federal. France, like England, and even more than England, is unitarian in government, yet, in respect of the Judiciary, France offers to England a contrast even more marked than do the above-named typically federal States. France may, indeed, be taken as typical of the States whose systems are permeated by the principles of Administrative Law, while England is exceptionally free from the infusion, but the contrast goes deeper than that, depending on causes which, though largely historical, are partly also temperamental

England
and
France

The unification of France, political, commercial, and judicial, dates only from the days of the first Revolution and the first Napoleon. England owed what a French jurist has well described as her 'precocious sense of national unity' to a variety of causes, but among them not the least potent was the development, at an exceptionally early stage of her political evolution, of a strong central administration in the hands of a succession of gifted and masterful kings.

Thanks, on the one hand, to the regular circuits of the Justices *in eyre*, and, on the other, to the survival of popular institutions such as the Shire Court, the hand of the central authority was felt in the remotest parts of the kingdom. As a result feudalism was never permitted to dismember England as, for a period of many centuries, it dismembered France.

Royal
Justice

Not, indeed, until the thirteenth century did Royal justice begin to make headway in France against the disintegrating forces of feudalism, and not until the Revolution were those forces overcome, and the permeating influence of feudalism finally eradicated from the body politic of France. The Parliament of Paris—the great central law-court of France, reorganized by Louis IX—had indeed exercised a certain measure of centripetal influence, but so strongly entrenched were the centrifugal forces opposed to it, that Courts of appellate jurisdiction were gradually set up in the provinces, and by the latter half of the eighteenth century provincial Parliaments existed at Toulouse, Grenoble, Bordeaux, Dijon, Aix, Pau, Rouen, Metz, Douai, Nancy, and in Brittany and Flanders-Comté.

The
French
Parlia-
ments

Meanwhile the lawyers who constituted the Parliament of Paris gradually established themselves as an hereditary *Noblesse de la Robe*. By a law known as the *Paulette* (1604) it was provided that the judges by paying to the Crown an annual commission amounting to one-sixtieth of their official incomes might secure the hereditary transmission of their offices. This practice, known as the *Vénalité des charges*, though open to obvious criticism, was commended

by Montesquieu (*Esprit des lois*, liv 5, c 19) and undoubtedly secured to France a succession of learned and independent magistrates, who, in the absence of other constitutional restraints upon the Crown, were able to offer some opposition, not wholly ineffective, to the inroads of autocracy. But in time the Judges of the Parliament became only one of several privileged orders, and by clinging to outworn privileges precipitated the Revolution.¹

The Constituent Assembly of 1789 not only made a clean sweep of the whole of the judicial system of the *Ancien Régime*, including the Parliaments, but laid the foundations on which the organization of justice has rested from that day to this.

Effect of
the Revolution
upon the
Judiciary

The judicial system of France now consists of two parts almost wholly distinct: the ordinary Courts and the so-called 'administrative' tribunals.

The administration of ordinary justice in France is not specially distinctive and need not detain us at great length, but it is otherwise, as will presently be seen, with administrative law and with the Courts or Councils which in this sphere exercise jurisdiction.

Ordinary
Courts

Of the ordinary Courts the lowest of the series are those of the *Juges de Paix*. In every Canton there is, under decree of the Constituent Assembly in 1789, a Justice of the Peace. The duty of this magistrate, as defined by ex-President Poincaré, is less to try lawsuits than to endeavour to prevent them. Petty disputes are brought before the Justice of the Peace, under a procedure which is known as the 'Preliminary of Conciliation', the parties appear privately before the magistrate, who endeavours, frequently with success, to persuade them to accept a friendly settlement.

*Juges de
Paix*

Apart from his function as a conciliator, the Justice of the Peace has legal jurisdiction both civil and criminal. Civil cases involving only small sums are decided by him,

¹ On the Parliament of Paris cf. Gasquet, *Précis des Institutions de France*, Rambaud, *Histoire de la Civilisation de France*, and Sir James Stephen, *Lectures on the History of France*, pp. 259 seq.

subject to an appeal, and he also deals with petty violations of Police Regulations

Courts of the First Instance In each *arrondissement* there is a Court of the First Instance which must consist of at least three judges—a President, sitting with two assessors. In the larger and more thickly populated *arrondissements* there are several such Courts. These Courts are competent to hear appeals from the *Juges de Paix*, and act as a Court of the First Instance in civil cases where a claim does not exceed a certain figure, and in criminal cases for the trial of misdemeanours (*Délits*)

Courts of Appeal Courts of Appeal, twenty-five in number, exercise the final appellate jurisdiction (with the exceptions to be noted later) both in civil and criminal jurisdiction. Several of them sit in the old Parliament town and include a varying number of Departments within their jurisdiction. To each of these Courts a minimum of five judges or councillors is assigned.

The Courts of Assize The Courts of Assize are the highest criminal Courts, appointed to try the gravest crimes, and to exercise jurisdiction in certain Press trials. Three judges preside, but in Courts of Assize, and there only, questions of fact are determined by a jury of twelve persons. From the Assize Courts there is no appeal on questions of fact, but an appeal on points of law lies from them to the Court of Cassation.

Cassation The Court of Cassation is not in the ordinary sense a Supreme Court of Appeal, it is rather in M. Poincaré's words, 'a supreme controlling Court charged with the cassation of all decisions which would be contrary to the law, or which would interpret them inaccurately'. It is called upon to decide, on the one hand, whether the procedure in the inferior Court was regular, and, on the other, whether the law was properly interpreted by the judges. If either of these questions is decided in the negative, the decision of the lower Court is quashed, but no new decision is given. The case is referred back to another tribunal of the same degree as that in which the offending decision was given.

Should the judges of the lower Court reaffirm the decision of their colleagues, the Court of Cassation will, on a second appeal, finally decide the disputed point. The Court ordinarily sits in three Chambers—the Chamber of Requests, the Civil Chamber, and the Criminal Chamber—each presided over by its own President, but for the purpose of hearing a second appeal all three Chambers sit together ¹

In addition to the ordinary Courts enumerated above there are certain special tribunals exercising quasi-judicial functions. Among these may be mentioned the Commercial Tribunals which perform the functions assigned in this country to Registrars in Bankruptcy and to Commercial Arbitrators. The Councils of Prud'hommes act as Courts of Industrial Conciliation, and are composed of employers and employees in equal numbers. 'Juries of expropriation' deal with questions of compensation to be paid to private individuals for the extinction of rights of property taken over by a public authority for public purposes. These juries are appointed in each department by a Court of Appeal or by the Court of the chief town of the department. Other Courts

The judges of all the ordinary Courts of Law are appointed by the Minister of Justice. The Constituent Assembly of 1789 decided that all judges from the *Juges de Paix* upwards should be directly elected by the people, but this virtuous principle did not survive the earlier days of the Revolution. Yet the results obtained by the present system are not wholly satisfactory. The judges in France are not, as in England and America, appointed from the ranks of those who have had experience at the Bar, but belong to a distinct calling. A judgeship is not, therefore, 'the crowning stage of a forensic career' ². Salaries are small, but judges enjoy a life tenure and cannot be removed except with the consent of the Court of Cassation. A fairly high standard of efficiency is reached by the Appointment of Judges

generality of French judges, and justice is for the most part honestly and capably administered, though, in Lord Bryce's judgement, 'not with so full a confidence of the people in the perfect honour of all the Courts' as is the case, for example, in Switzerland¹ The appointment of judges is not, as a rule, political in character, but judges have from time to time been required by the Government of the day to swear fidelity to the Republic, and on two occasions, in 1879 and in 1883, a large number of judges and other legal officials whose loyalty to the Republic was suspected were removed by a wholesale process of purgation These purges resulted in the removal of nearly one thousand judges and over seventeen hundred legal officials The circumstances of the day were, however, in both cases, exceptional the new Republican Constitution was in its infancy and politicians were not unreasonably fearful as to the stability of the Republic

Adminis-
trative
Law

If it be true that no peculiar interest attaches to the administration of ordinary justice in France, it is quite otherwise in regard to the system of Administrative Law, and to the working of the Administrative Tribunals

Administrative Law is not, as is commonly imagined, the invention of Republican France The principles which lie at the root of it are, on the contrary, deeply embedded in the fibres of the social and constitutional life of the French people Writing of the *Ancien Régime* Tocqueville says 'in no country in Europe were the ordinary Courts of Justice less dependent on the Government than in France, but in no country were extraordinary Courts of Justice more extensively employed These two circumstances were more nearly connected than might be imagined'² In consequence of the intrusion of the Judiciary—and in particular the Parliament of Paris—into the sphere of administration, the Crown was tempted to retaliate by withdrawing from the jurisdiction of the Courts suits in which the Government was interested, and by calling into being special tribunals

¹ *Op cit.*, II 578 ² *France before the Revolution* (Eng Tr.), p 95

The tendency of the Revolution was in the same direction. The Constituent Assembly applied with rigour (as we have already seen in other connexions) Montesquieu's doctrine of the separation of powers, and all the subsequent Constitutions of France have confirmed that doctrine. It must be observed, however, that to Montesquieu's doctrine widely divergent interpretations were given by the Republicans of France and the Republicans of the United States of America respectively. Both applications, as an American commentator has observed, are

' perfectly logical, but they are based on different conceptions of the nature of Law. The Anglo-Saxon draws no distinction between public and private law. To him all legal rights and duties of every kind form part of that universal system of positive law, and so far as the function of public officials are not regulated by that law, they are purely matters of discretion. It follows that every legal question, whether it involves the power of a public officer or the construction of a private contract, comes before the ordinary Courts. In France, on the other hand, private law, or the regulation of the rights and duties of individuals among themselves, is treated as only one branch of Jurisprudence, while public law which deals with the principles of Government and the relations of individuals to the State is regarded as something of an entirely different kind.'¹

The fathers of the American Constitution accepted Montesquieu's principle as inculcating the necessity of protecting the Courts of Justice from the control or influence of the other branches of Government. The French Republicans, with equal deference to Montesquieu's doctrine, interpreted his teaching in the sense that the Executive ought to be free to act in the public interest without hindrance from the Courts of Law.

What, then, is the precise nature of Administrative Law? It has been defined by Aucoc as 'the body of rules which regulates the relations of the administration or of the administrative authority with private citizens'. It determines, he says, '(1) The Constitution and the rela-

Defini-
tions

¹ Lowell, *op cit.*, 1, pp 55-6

tions of those organs of society which are charged with the care of those collective interests which are the object of public administration, by which term is meant the different representative societies among which the State is the most important, (2) the relation of the administrative authorities towards the citizens of the State' ¹ Professor Goodnow defines it as 'that part of the public law which fixes the organization and determines the competence of the administrative authorities, and indicates to the individual remedies for the violation of his rights' ² It will not escape notice that the last words of Professor Goodnow's definition suggest a function of Administrative Law very different from, if not actually opposed to, the function ascribed to it by Professor Dicey. But the American critic holds Mr Dicey's conception of the French *Droit administratif* to be quite unwarranted. To the discussion of this somewhat controversial point we shall return later.

The
Adminis-
trative
Courts

We must first pass in brief review the chief Administrative Courts, or as they are technically, and perhaps more accurately, termed, 'Councils'. For none of them (unless we include among them the *Tribunal des Conflits*) is wholly judicial in its operation. Only, however, with their judicial or quasi-judicial functions are we concerned in this section.

The
Con-
seil de
Préfec-
ture

The Council of the Prefecture forms the first degree of administrative jurisdiction, and has competence to decide almost all questions which arise between the lower branches of the Executive Government and private citizens. In particular, it decides questions arising in connexion with direct taxation, and also certain special questions of fact relating to the indirect taxes, though, generally speaking, questions of indirect taxation lie within the jurisdiction of the ordinary Courts. The Council of the Prefecture determines the validity of the elections to the Council of the *Arrondissement* and to the Municipal Council, and all questions relative to the administrative control over the

¹ *Droit administratif*, I, § 6

² *Comparative Administrative Law*, I, 9

Communes and public establishments. It deals also with infractions of police regulations relating to main roads (*grandes voies*) (though questions relating to by-roads (*petites voies*) come before the ordinary Courts), with the draining of marshes, and with quairies. The Council has an extensive jurisdiction over the contracts made by the Government for public works, both central and local, for materials and supplies, and for the public domain, and it also acts as a board of audit for the accounts of the officials of public establishments and of the less important communes.

The 'Court' is composed of three or four Councillors, with the Prefect as President (though the latter seldom sits), and the Secrétaire Général of the Prefecture, who represents the Government. The Councillors are appointed and removable by the President of the Republic, they receive a salary and are required to give their whole time to the work of the Council.

In all cases an appeal lies from the Prefectural Council to the Council of State.¹

Parallel with the Councils of the Prefectures, which exercise a general administrative jurisdiction, are certain special Courts, such as the Educational Councils and Councils of Revision.

Special
Adminis-
trative
Courts

The Educational Councils are largely composed of teachers, and deal mainly with the complaints of teachers against the officials of the State. The Councils of Revision deal similarly with complaints arising from the operation of the conscription laws.

The supreme and by far the most important administrative tribunal is the Council of State. This institution has had a long and chequered history, but is now firmly established as one of the most important bodies in the government of modern France.

Conseil
d'Etat

As the *Conseil du roi* it played an immensely important part during the *Ancien Régime*, and, in particular, during the period of the absolute monarchy. Abolished by the Constituent Assembly in the first days of the Revolution,

¹ Aucoc, *op cit.*, I. 495-517, Goodnow, *op cit.*, II. 233 seq.

it was revived during the Consulate by Buonaparte as the *Conseil d'État*. Its members were divided into various commissions—Finance, Justice, War, the Navy, and the Interior—and all of them met daily at the Tuileries, generally under the presidency of the First Consul himself. Under the supervision of this Council all the great legal and administrative reforms of the Consulate and Empire were carried out, and the domestic structure of modern France was reared. Its functions were greatly circumscribed under the Governments of the Restoration, and of the Orleans Monarchy, but were again enlarged under the Second Empire. Suppressed on the fall of the Napoleonic régime in 1870, it was provisionally reconstituted in 1872, and was finally adopted into the new Constitution of the Third Republic by the Law of 13 July 1879. The Council performs a variety of functions, legislative and administrative, with which in the present connexion we are not concerned, except to observe that in view of the form of French statutes, which contain, as a rule, nothing but an enunciation of certain general principles, and which delegate to the Executive the power to regulate details by ordinance, an immensely important quasi-legislative function is imposed upon the Council of State. To this body it is left not merely to advise on matters within the sphere of the Executive, and also to act in a judicial capacity, but actually to play a determining part in the details of legislation.

The Council is composed of thirty-five councillors *en service ordinaire* and twenty-one extraordinary members. The former are permanent members and receive salaries. They must be at least thirty years of age and are appointed by the President of the Republic on the recommendation (which is not invariably followed) of the Cabinet. They are selected from among high officials and the *maîtres des requêtes*—or commissioners. The masters of requests, thirty-seven in number, also form part of the Council of State, being appointed by decree, and charged with the special duty of preparing dossiers. There are, in addition,

fifty auditors, twenty-eight of the first class and twenty-two of the second, all of whom are recruited by competitive examination

The twenty-one Councillors in extraordinary service are not permanent members of the Council, and are appointed by the President of the Republic from among civil servants whose advice is desired on matters pertaining to the several departments

Cabinet Ministers have also the right to attend the plenary sessions of the Council, and to vote on administrative (but not judicial) matters affecting their respective departments, but the main work of the Council is done not in general assembly but in sections and subsections. The sections deal respectively with legislation, justice, foreign affairs, home affairs, education, fine arts and religion, finance, war, marine and colonies, public works, posts and telegraphs, agriculture, commerce and industry, labour and social insurance. The Minister of Justice is the nominal President of the Council of State (except when the Council sits as an administrative tribunal), but the actual work is delegated to a vice-president, assisted by the presidents of sections

As an Administrative Tribunal the Council was reorganized by the Law of 8th April 1910. In this capacity it acts as a Court of Appeal from the decisions of the *Conseils de Préfecture*, and also as a Court of First Instance to try questions at issue between private citizens and officials of the State. The Court is highly respected and the number of cases referred to it is immense.¹

Judicial
work
of the
Council

To bring into harmony the civil and the administrative tribunals there was constituted in 1848 an independent Conflict Court. After the *coup d'état* of 1851 this Court ceased to function, but it was reconstituted by the Law of 24th May 1872.

The
Tribunal
des
Conflits

It consists of eight elected judges, together with the Minister of Justice (*Garde des Sceaux*) who is *ex-officio*

¹ Aucoc, *op cit*, 1 126 seq. Poincaré, *op cit*, 273-4. Goodnow, *op cit*, 1 107 seq.

President of the Court, but the Minister, though entitled to vote, rarely attends, and a Vice-President is elected by and from the eight elected judges and generally presides. The elected judges are carefully chosen to represent equally the authority of the *Cour de Cassation*, which, as we have seen, is the highest judicial Court of France, and the authority of the Council of State, which stands at the head of the administrative hierarchy. Three judges are, therefore, elected from among and by the judges of the *Cour de Cassation*, and three from among and by the *Conseillers d'État en service ordinaire*, i.e. the permanent members of the Council of State. One additional judge is co-opted by each of the two groups named above, and as a rule each elects one of their own colleagues belonging respectively to the Court of Cassation and the Council of State. In every case the judge is elected for three years, but is re-eligible and is, as a rule, re-elected. There are also two substitutes similarly elected from the two groups, but they act only in the absence of a colleague. Finally there are two so-called *Commissaires du Gouvernement* appointed in each case for one year by the President of the Republic: one from the *maîtres des requêtes* belonging to the Council of State, the other from the public prosecutors attached to the Court of Cassation.

The presence of these *Commissaires*, taken in conjunction with the right of a Cabinet Minister to preside and vote, might provoke apprehensions lest this most important tribunal should be unduly under the influence of the Government of the day. The apprehension is, moreover, emphasized by the brief tenure which, theoretically, the judges themselves enjoy. This is an obvious defect which might and should be removed, but, in the opinion of Mr. Dicey and of the best French authorities, the *Tribunal des Conflits* comes near to an absolutely judicial body and commands general confidence.¹

¹ Dicey, *op cit* (7th Edition), pp. 360-2, and Note xi (pp. 555-6), *Laferrière, Traité de la Jurisdiction administrative*, 1 24, *Jeze, op cit*,

It remains to consider how far the existence of a body of Administrative Law and of a series of special Tribunals charged with the application of this Law is compatible with personal liberty, and, in particular, with the ideas of personal liberty which have long been held by Englishmen and by the English-speaking world ?

Adminis-
trative
Law and
Personal
Liberty

Only in the last forty years has this question, as it affects the customs and traditions of two neighbouring peoples of Western Europe, become a subject of consideration by an average citizen in either country. The matter was first introduced to the notice of Englishmen by the publication of a treatise, already classical, written by a jurist of unquestionable genius. The besetting sin of great teachers (and since Blackstone there has been no greater expositor of English law than Albert Venn Dicey) is over-emphasis. It may be that in the earlier editions of his masterly treatise Dicey tended to exaggerate the distinction between the 'Rule of Law' and the *droit administratif*, and that, in consequence, he was inclined to deny to Frenchmen the enjoyment of those guarantees for personal liberty which are the cherished birthright of Englishmen. The pervasive influence of Dicey's teaching may be appraised from the fact, stated on the authority of a recent writer, that 'ninety per cent. of students beginning the study of constitutional laws form the impression that France lives under a system of bureaucratic tyranny little short of Tsarism', or we might say of Bolshevism. Of course, as Mr. Allen is careful to add, nothing could be further from the truth, and, as we shall see, Dicey lived to modify in some degree the sharpness of outline of the contrast as he originally pointed it.

No Englishman can, however, approach the consideration of this interesting question, with any measure of detachment or impartiality, who has not been at pains to appreciate the strength of French tradition in regard respectively to the Executive and the Judicial spheres of government. The French tradition is wholly in favour of a strong Executive, and naturally so. France, as modern Frenchmen know it, was made by its kings. Autocratic

centralization was essential to the defeat of the disintegrating influence of the feudal nobility. The unity of England was secured, as we have seen, at a much earlier stage of national development. Consequently Englishmen have been more concerned with the assertion of their personal rights against the Executive.

Another reason has been operative in France. Whether Montesquieu did or did not rightly apprehend the spirit of English institutions, whether the French people have correctly or incorrectly interpreted Montesquieu's teaching, the fact remains that they have believed themselves to be deferential to that teaching in their refusal to allow the Judiciary to invade the sphere of the Executive. The experience of the *Ancien Régime* taught them to be much more suspicious of the Judiciary than of the Administration. Moreover, they have for at least a century been wont to resort to the Administrative Tribunals, just as in the sixteenth century Englishmen resorted to the Tudor Star Chamber, in the well-grounded belief that there they could obtain justice at relatively small cost and with a minimum of delay.

English tradition has, on the contrary, tended to dispose the citizens of this country, if not to opposition to the Government, at least to suspicion of its subordinate officials. It is therefore inconceivable that they should ever have permitted such a provision as the famous Article 75 of the Constitution of the year viii (1799) to have been incorporated in a statute, much less to have been wrought into the very texture of the Constitution itself. That Article provided that agents of the Executive Government, other than the Ministers, could only be prosecuted for their conduct in the discharge of their functions in virtue of a decision of the Council of State.

It is, indeed, as Mr. Dicey has pointed out, one of the cardinal principles of Administrative Law that servants of the State who, 'whilst acting in pursuance of official orders or in the *bona fide* attempt to discharge official duties, are guilty of acts which in themselves are wrongful

or unlawful', must be protected from the ordinary Courts. He admits, however, that this protection, once almost complete, is now far less extensive than it was even forty years ago. He points out that, as amended since 1870, partly by legislation and still more by case-law, the modern *droit administratif* of France approaches 'to a regular though peculiar system of law'. Developing under the influence of lawyers rather than politicians, it has during the last half-century 'to a great extent divested itself of its arbitrary character, and is passing into a system of more or less fixed law administered by real tribunals'. The Administrative Tribunals may still lack some of the qualities of genuine Law Courts, but they are 'certainly very far indeed from being mere departments of the Executive Government'. He regards it, therefore, as 'possible, or even probable, that *droit administratif* may ultimately, under the guidance of lawyers, become, through a course of evolution, as completely a branch of the law of France (even if we use the word 'law' in its very strictest sense), as Equity has for more than two centuries become an acknowledged branch of the law of England'. Nevertheless Mr Dicey, so lately as 1908, persisted in his original contention that *droit administratif* 'is opposed in its fundamental principles to ideas which lie at the basis of English constitutional government', while admitting that 'mainly owing to the enlightenment of French jurists' this opposition 'tends every day to diminish'.¹

Another question at this point obtrudes itself. Has the approximation between the legal systems of France and England come from one side only? Is it only true that the administration of the law in France has tended to approach more near to its administration in England? Has not the approximation been mutual? Mr Dicey, in the Introduction to the last edition (1915) of his famous treatise, admitted the existence of 'a very noticeable though slight approximation towards one another of what may be called the official law of England and the *droit*

¹ *Op cit.*, 7th edition. Preface, p 12, and pp 377-8

administratif of France'¹ That there has, in fact, been some measure of approximation can hardly be questioned by any readers who have followed with attention the argument of the preceding chapters of this book. The remarkable increase in the number and variety of the duties now imposed upon the State and its officials, combined with the latitude permitted by recent legislation to civil servants in the exercise of quasi-judicial functions, would seem to render it impossible to maintain that rigid demarcation of boundaries between the Judiciary and the Executive which has so long characterized English constitutional law. Of the tendency to entrust the Executive with the power to carry through subordinate legislation as well as of the tendency to confer upon officials judicial authority, illustrations have already been given. Mr Dicey is then more than justified in his cautious conclusion

'It may not be an exaggeration to say that in some directions the law of England is being "officialized" by statutes passed under the influence of Socialistic ideas. It is even more certain that the *droit administratif* of France is year by year becoming more judicialized''²

Can bone? There remains the question. Is it well? Such tendencies as have been diagnosed above must be viewed with suspicion unless it can be shown that they contribute to efficiency of administration, and, further, that increased efficiency is fraught with advantage to the citizens of the State. Do contemporary tendencies in England react to this elementary test? Does the individual citizen stand to gain or lose by the increased activity and enhanced power of the Executive Government? An attempt to answer these questions with any approach to thoroughness would carry us into the domain of political philosophy, even if it did not involve us in the current controversies of party politics. In either case detailed discussion would be repugnant to the purpose of the present work. Summarily, however, it may be said that this is evidently a matter in which the interests of the many may well

¹ p. xliii² *Op. cit.*, Introduction (8th edition), p. xliiv

conflict with the convenience and even with the legitimate interests of the relatively few. An extension of bureaucratic authority is almost certain to bring the officials of the State into conflict with individuals who resent the intrusion of the Government and its myrmidons into affairs which the individuals reasonably regard as exclusively their own. Yet regard for the interests of the community at large may justify the intrusion. Familiar illustrations of such intrusion is found in the violation of the amenities of a country estate by the making of a railway or the construction of sewage works. But the real point at issue is not the expediency or in expediency of such intrusion, but the propriety of delegating the authority to intrude to any body less representative of the whole community than Parliament itself. Yet the two questions are more closely interconnected than at first sight may appear. Delegation of authority—quasi-legislative and quasi-judicial—to officials is the almost inevitable concomitant of a rapid extension of the functions of Government. Only by some measure of delegation can the Legislature and the Judiciary respectively keep abreast of their work.

Those who regard the multiplication of State activities as in itself mischievous will find no difficulty in answering the question proposed in the preceding paragraph without hesitation or ambiguity. They at least are logically entitled to deplore the tendency to erase the boundary lines which delimit the several spheres of the Legislature, the Executive, and the Judiciary. To them administrative law is as much anathema as delegated legislation. They can hardly fail, therefore, to be startled by the contention of a highly competent critic that the country which has led the world in both these directions offers securities to the private citizen at once more accessible and more effective than those which are enjoyed under the English 'rule of law'.

'The development of French administrative law in the last century has been very much more in favour of the subject than of the administration. The remedies of the subject

against the State in France are easier, speedier, and infinitely cheaper than they are in England to-day. It has become a maxim of Constitutionalists, and a bulwark of French democracy, that the Conseil d'État is the great buffer between the public and the bureaucrat.¹

Can this contention be sustained? If it can, it is evident that some of the lessons which a whole generation of Englishmen have learnt from Mr. Dicey will have to be modified if not discarded. But this is obviously a question on which a foreigner should be slow to express a dogmatic opinion. It is at least as difficult for an Englishman to speak positively about the practical working of French institutions as it is for most Frenchmen really to appreciate the genius of the English Constitution.² Perhaps reconciliation between opposite views is to be found in the words of the quotation which I have italicized. It is notoriously difficult for an English citizen to enforce rights against the *State*, or, as we should say, the Crown, while it is exceptionally easy for him to obtain redress for injuries against the agents of the Crown. Moreover it must be remembered that Mr. Allen wrote under a sense of irritation (wholly natural and pardonable in a lawyer) induced by war-time circumstances and by the efforts of the Executive and the Courts to decide, on reasonably equitable rather than strictly legal terms, the disputes between the Crown and the subject to which those circumstances inevitably led.

The only conclusion to which a foreign commentator from either side of the Channel, or of the Atlantic, can safely come—and it is a lamentably lame one—may be expressed in the adage *chacun à son goût*. The sense of an Englishman would be as much outraged by inability to proceed against an official in an ordinary Court, under the ordinary law, as would be that of a Frenchman who found himself suddenly deprived of recourse to those accessible administrative tribunals to which he has long been accustomed, and in whose judgements he has learnt to confide.

¹ Allen, *op. cit.*, p. 247.

There are notable exceptions to this rule. M. Roumy is one of them.

BOOK VII
LOCAL GOVERNMENT
DEVOLUTION AND FEDERALISM

XXXV. LOCAL GOVERNMENT: (1) RURAL

'England alone among the nations of the earth has maintained for centuries a constitutional policy, and her liberties may be ascribed above all things to her free local institutions. Since the days of their Saxon ancestors, her sons have learned at their own gates the duties and responsibilities of citizens'—SIR T. ERSKINE MAY

'Local assemblies of citizens constitute the strength of free nations. Town meetings are to liberty what primary schools are to science; they bring it within the people's reach; they teach men how to use and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty'—TOCQUEVILLE

'Year by year the subordinate government of England is becoming more and more important. The new movement set in with the Reform Bill of 1832, it has gone far already and assuredly it will go farther. We are becoming a much governed nation, governed by all manner of councils, boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes'—F. W. MAITLAND.

'Whatever "Educative" value is rightly attributed to representative government largely depends on the development of local institutions'—HENRY SIDGWICK.

THE nineteenth century witnessed, as we have seen, a far-reaching revolution in the constitution of the Central Legislature. It witnessed a revolution hardly less striking in the structure and machinery of local administration. Of that revolution and its results we must now give some account; since it is manifest that local administration affects the well-being of the community, perhaps more vitally, certainly more directly, even than that of the Central Government. When the century opened, and, indeed, throughout more than three-quarters of its course, the squirearchy, officially represented by the County Magistrates, were securely established in the citadel of Local Government. From their dominating position in Parliament they were driven, theoretically, by the Act of 1832, practically by that of 1867. But in County Government they continued to bear sway until 1888.

Reorganization of Local Government in the Nineteenth Century

The Corporate Municipalities at the opening of the last century were governed by Corporations which for the last four hundred years had been steadily growing more oligarchical in character. These local urban oligarchies survived the overthrow of the great central oligarchy by only three years, one of the first-fruits of the reformed Parliament being the Municipal Reform Act of 1835.

The present chapter will describe in outline the existing machinery of rural Local Government. But if it be true of the Central Government that the roots of the present lie deep in the past, and that consequently analysis of existing conditions is unintelligible without some historical retrospect, not less but even more is this true of Local Government.

The towns, whatever their origin (a highly debatable question), have almost from the first been regarded as something anomalous and exceptional. Apart from them, there have, from time immemorial, been three main areas of local administration—the Shire or County, the primary unit of the Township (or Parish), and the intermediate area of the Hundred—represented later by the Union, and now in some sort by the District.

The history of Local Government divides into four great periods: the first extends from the earliest times down to the Norman Conquest, this may be distinguished as the period of popular Local Government; the second, from the Norman Conquest to the fourteenth century, a period of strong and centralizing monarchy; the third, from the fourteenth century to 1888, an aristocratic period, and the fourth, from 1888 onwards, a period increasingly democratic in tendency.

The Shire
or County

The Shire or County, as the most important area of Local Government, must engage our attention first. From the earliest times to the present one officer has maintained his position in the Shire, though the position has implied at different times very varying degrees of authority. That officer is the Shire-reeve or Sheriff. From Saxon days to those of the later Plantagenets the Sheriff was the pivot of

county administration, in the fourteenth century he was superseded, for most purposes, by the Justices of the Peace, as they in turn were, for many purposes, superseded in 1888 by elected County Councils. But the office of Sheriff still survives all vicissitudes.

The earliest Shires, such as Kent, Sussex, Middlesex, Essex, Norfolk, Suffolk, Dorset, Somerset, represent the original settlement of Teutonic tribes, and in some cases original heptarchic kingdoms. Thus Kent represents the original kingdom of the Jutes, Sussex of the South Saxons, and so forth.

The next batch of Shires represent artificial delimitation rendered possible by the West-Saxon reconquest of the Danelaw. In these cases the Shire takes its name from the principal or 'County' town, as in Oxfordshire, Hertfordshire, Warwickshire, Worcestershire, Lincolnshire, Nottinghamshire, Northamptonshire, and so on. A few Shires such as Cumberland and Lancashire represent even later absorptions or delimitations. Latest of all were the counties of Wales.

In every Shire there was a Court consisting partly of elected representatives from the subdivisions of the Hundred and Township, partly of nominated members. This Court or Moot represented the folk-moot or Witan of the original Teutonic kingdoms—the *Civitas* described in the *Germania* of Tacitus. Its roots therefore lay in the most distant past. It met twice a year for the dispatch of business, legislative, administrative, and judicial. Its officers were the Ealdorman (afterwards Earl), the Bishop, and the Sheriff. The first was a national officer appointed by the King and the National Council (Witnagemot), but he originally represented the old royal houses in the Shires which had been independent kingdoms. With the Ealdorman sat the Bishop, representing an authority not yet differentiated from that of the State, while the Sheriff was the special representative of the King or Central Government, responsible to the King for the local administration of justice and for the collection of all financial dues.

The
Shire
Court

The
Sheriff

After the Norman Conquest the importance of this functionary was rapidly enhanced. The Norman and Angevin kings, quick to adapt existing institutions to their own purposes, saw in the Sheriff and the popular Court of the Shire valuable instruments for holding in check the disruptive tendencies of the feudal system. To this end the Sheriff and his Court were sedulously encouraged and maintained.

The survival of popular local institutions is, indeed, one of the many benefits which England derived from the exceptionally early development of the royal power and from the creation of a central administration exceptionally strong and efficient. Had the Norman Conquest imported into England the feudalism of France, the free local institutions which were so characteristic a feature of the Anglo-Saxon polity must inevitably have perished. A monarchy, powerful and in some respects highly centralized, found its most trustworthy support against the barons in the local institutions and officials inherited from pre-Conquest days. The advantages were mutual. The Crown relied upon the people in the contest against feudal independence, the people found in the Crown their most efficient protector against local tyranny.

When, under Henry I, and still more under Henry II, the administrative and judicial system was reorganized, when regular circuits of officers of the central *Curia* were instituted, it was the Sheriff who had to prepare for their coming, and it was in the Court of the Shire that their duties, fiscal and judicial, were performed. It is to-day the chief surviving function of the Sheriff to prepare for the coming of the King's Judges of Assize, to attend them in Court, and to execute the sentences they pronounce.

Towards the end of the thirteenth century, still more rapidly in the fourteenth, the power of the Sheriff declines. In the Justice of the Central Court (*Curia Regis*), with his regular circuits, the Sheriff had long had a serious rival. The development of feudal jurisdiction in the manorial courts had already impaired his authority locally. But the most serious blows came from the development of central

representation in Parliament, and the evolution of a new set of local functionaries, originally designated Guardians of the Peace (*Custodes Pacis*), and, from 1360, Justices. The rise of the House of Commons diminished the lustre of the local moots of the Shire, but at the same time, as we have seen, gave them a new and important function. The Sheriff became the returning officer for knights and burgesses, and in his Court they were elected. Thus duty the Sheriff still retains¹ as regards parliamentary elections in counties, and in the few historic cities which, in virtue of the fact that each is in itself a 'county of a city', possess a Sheriff. The Parliamentary boroughs which are (or prior to 1918 were) counties of themselves are London, Bristol, Canterbury, Chester, Exeter, Gloucester, Kingston-upon-Hull, Lincoln, Newcastle-upon-Tyne, Norwich, Nottingham, Southampton, Worcester, and York.²

From the mediæval Shire we may pass to the Hundred. What was the origin of the Hundred? That is a question which would involve us in a prolonged antiquarian inquiry from which we should emerge without any certainty. The Hundred may have originated in the settlement of a hundred warriors of the Teutonic host, or perhaps we must regard it as a unit for the assessment of taxation, or possibly as an artificial subdivision of the Shire selected primarily for police administration by one of the later Saxon kings. We cannot positively say. But certain points are clear. The Hundred, if a territorial subdivision, was not of uniform size, there were sixty-three Hundreds in Kent, sixty-four in Sussex, but only five in Leicestershire. If the Hundred was the area originally occupied by one hundred warriors this discrepancy would be accounted for. Further, we know that in later Saxon days the Hundred moot or Court was the ordinary resort of the men of the Hundred for the administration of justice, civil and criminal, further, that 'all the suitors were the judges',

The
Hundred

¹ Not, however, in Oxford, which is not included in the list of counties, of cities and towns given in Halsbury, *Laws of England*, vol. xix, p. 310, and of vii 240, and xcv, p. 796.

² Municipal Corporations Act, 1882 (45 & 46 Vict., c. 50), s. 444 (1).

though they acted through a jury of twelve. The Court met monthly, and twice in the year the Sheriff attended and held his 'tour' to see that the police regulations of the district were being faithfully observed. After the Norman Conquest, however, the importance of the Hundred Court somewhat rapidly diminished. Its decay was due partly to the development of private jurisdictions in the manorial courts of the feudal lords, and later to the increasing ubiquity of the King's judges and the growth of the Royal Courts.

But in the judicial and administrative system of the Angevin kings the Hundred had still an important place. It was still the unit of the police system and of the military system for the arming of the people in the national militia, it was still responsible for the pursuit of malefactors, and for presenting, through its grand jury of twelve lawful men, the criminals of the district for trial before the King's Judges of Assize. Of this last function there are still lingering traces. Thus Manchester, for Assize purposes, is still in the 'Hundred' of Salford, Liverpool in that of West Derby, Birmingham in that of Hemlingford. Down to 1886 the Hundred was still responsible for damages due to riots. But, long before that, the Hundred and its Court had for all practical purposes ceased to exist, and to-day the interest which attaches to it is purely antiquarian.

The
Town
ship,
Manor,
and
Parish

It is far otherwise with the Township—the Vill or Tun,¹ the unit of local self-government from time immemorial. Into Townships the whole of England was exhaustively divided, and the Township was, as Maitland points out, selected by the State as the 'unit responsible for good order'. As a unit for fiscal purposes the Township, as we have seen, was represented in the Court of the Shire by the 'Reeve and four best men', and it is from the Townships on the royal demesne that John first summoned representatives to the Central Assembly of the realm. Yet the name 'township', still more 'vill', has an antiquarian flavour,

¹ This is not the place for the discussion of the highly technical question as to the precise character of the Vill.

and for a simple reason. From the seventh century the 'Township' was captured by the Church as the unit of ecclesiastical organization, and for all practical purposes became henceforward known as the 'Parish' (*παροικία*), or dwelling-place of the priest.

But before final victory was assured to the 'Parish' a long contest was waged between the ecclesiastical and the feudal authorities, between the Court of the Parish Meeting in the Vestry, and the feudal Courts of the Manor. That the cause of the Church was the cause of freedom cannot be denied, and to that side victory ultimately inclined, but the strife was long and bitter.

At an early stage the Township virtually disappeared. Even before the Norman Conquest a very large number of 'Townships' had become dependent upon a 'lord', or, in technical language, had become manors—a *manerium* being merely, in the first instance, the abiding-place of a lord, just as a 'Parish' was the dwelling-place of the priest. Into the history of the manor, with its elaborate organization, social, agricultural, and judicial, it is impossible to enter here. It must suffice to point out that for all practical purposes the legal Township merged, from the eleventh century onwards, into a manor, and as a manor was regarded and organized until the decay of feudalism in the fourteenth century and the reorganization of Local Government under the Tudor sovereigns. When the Township re-emerged from under the ruins of the feudal superstructure elaborately imposed thereon, it was as the 'Parish' selected by the Tudors to be the unit of their new administrative system. We are now approaching the close of the second great period in the history of Local Government. The popular or (to adopt Maitland's emendation) the 'communal' Courts of Shire and Hundred have fallen into all but complete decay. The Shire Court had lost its criminal jurisdiction before the end of the thirteenth century, and by the end of the fifteenth the Courts both of Shire and Hundred survived only as 'petty debt courts held by the under-sheriff'—a function to which, curiously

enough, the new County Courts of the nineteenth century have been primarily devoted

The Shire Court has already entered upon a new phase of political importance, but in a judicial sense the old Communal Courts have gone down before the competition first of the feudal, then of the royal Courts, while the presiding officer, the Sheriff, has similarly given place to the Justice of the Peace or County Magistrate

The power of the 'provincial viceroys' had been waning ever since the great commission of inquiry known as the *Inquest of Sheriffs* (1170). The growth of the power of the 'Legal Knights', culminating in their admission to Parliament, the development of towns (to be noticed presently), with their independent fiscal and judicial powers, the institution of the office of *Coroner* (1194), and the significant transference of criminal jurisdiction from the Sheriff in the Great Charter (1215)—all these represent stages in the decay of the authority of this once all-powerful functionary. The end really came with the institution of a new class of local officials ultimately known as Justices of the Peace

The
Justice of
the Peace

The origin of the new office may be found in the *Proclamation for the preservation of the Peace* (1195), by which knights were appointed to receive the oaths for the maintenance of the peace. Knights were similarly assigned to 'maintain the peace' in 1253 and 1264, and in 1285 *Custodes Pacis* were elected in the County Courts to secure the enforcement of the great police measure, the *Statute of Winchester*. By an Act of 1327 Conservators of the Peace were to be appointed in every county, and thirteen years later the office of Sheriff became an annual one. 'No Sheriff shall tarry in his bailiwick over one year' (14 Edward III, c. 7). In 1360 the Conservators of the Peace were transformed into 'Justices of the Peace', and were endowed with authority to try felonies. Two years later, the new Justices were required by statute to hold meetings four times a year, and thus *Quarter Sessions* knocked the last nail into the coffin of the old communal Court of the Shire

The fifteenth century was a period of rapid constitutional development, but of ever-deepening social anarchy. Reiterated complaints laid before the House of Commons, taken together with the revelations of contemporary literature,¹ afford conclusive testimony to the prevailing sense of 'lack of governance'. They point at the same time to some of the causes and symptoms of the disease. Perhaps the most sinister phenomenon was the revival of a 'bastard' form of feudalism and the emergence of the 'overmighty subject'. 'Certainly,' wrote Fortescue, 'ther may no gretter perell growe to a prince, than to have a subgett equepotent to hym self'. The most disquieting symptom of the new feudalism was the growth of a custom of 'livery and maintenance'. The great lords surrounded themselves with crowds of retainers—many of them disbanded soldiers who had fought in the French wars—who wore their livery and fought their battles, while in return the lords 'maintained their quarrels and shielded their crimes from punishment'. The 'livery of a great lord was', says Bishop Stubbs, 'as effective security to a malefactor as was the benefit-of-clergy to a criminal clerk'. One of Suffolk's men boasted 'that his lord was able to keep daily in his house more men than his adversary had hairs on his head'.² Repeated complaints were lodged by the House of Commons. Thus in 1406 they complained that 'banners, knights, and esquires gave liveries of cloth to as many as three hundred men or more to uphold their unjust quarrels and in order to be able to oppress others at their pleasure. And no remedy could be had against them because of their confederacy and maintenance'. Legislation was repeatedly attempted, but legislation was wholly ineffective to remedy the disease. What was needed was strong and equal administration. The country was 'out of hand', law was paralysed, judges and jurors were equally corrupt or equally intimidated by the 'overmighty subject'. The *Paston Letters* teem with illustra-

¹ Notably Fortescue, *Governance of England* (ed. Plummer), and the *Paston Letters* (ed. Gaudner).

² Plummer's Fortescue, p. 27.

tions of the prevailing evils ' Nothing is more curious ', writes Mr Plummer, ' than the way in which it is assumed that it is idle to indict a criminal who is maintained by a powerful person, that it is useless to institute legal proceedings unless the sheriff and jury can be secured beforehand ' ¹ The natural consequence ensued All who had might took the law into their own hands Private wars were common as they had never been since the civil days of Stephen Noble was at war with noble, county with county

It was this social anarchy which called for the strong hand of the Tudor ' dictators ', to whom for a time men were willing to surrender much in order to obtain the supreme blessing of administrative order

The
Tudor
man-of-
all-work

The Tudors took vigorously in hand the reorganization of Local Government With their sure instinct for the vitalities they took the *Parish* as their administrative unit, and made the *Justice of the Peace* their man-of-all-work William Lambaerde, writing under Queen Elizabeth, complains that he and his brother magistrates were utterly overloaded, and fears that their backs would be broken by these ' not loads, but stacks of statutes ' His groans were not without justification Henry VII passed twelve, Henry VIII no less than fifty, Edward VI nineteen, Queen Mary nineteen, and Queen Elizabeth fifty-four statutes (down to 1579 only) affecting in one way or another the functions of this over-burdened official Well might Sir Thomas Smith, also writing under Queen Elizabeth, declare that ' the Justices of the Peace be those in whom the Prince putteth his special trust ' It is essential, therefore, to get some notion of the work which the Justice of the Peace at this period had to do

He was at once judge, policeman, and administrative man-of-all-work, he was responsible for the trial of criminals, for the maintenance of order, and for carrying into effect that huge mass of social and economic legislation which was particularly characteristic of Tudor rule

¹ Plummer's *Fortescue*, p. 29

He was primarily a judge. In his own parish he sat alone and tried petty cases without a jury, four times a year he met his brother magistrates of the whole county in Quarter Sessions, later on (in 1605), an intermediate division was created in which he sat with two or more brethren in Petty Sessions. With his judicial duties, however, we have dealt in preceding chapters. His special significance in relation to the Tudor Dictatorship consists rather in the multitude of administrative duties which he was expected to perform. He had to fix the rate of wages for servants and labourers, to bind apprentices and cancel indentures, to fix the prices of commodities, to appoint and dismiss constables, to see to the maintenance of jails and bridges and highways, to supervise the payment of pensions to maimed soldiers and sailors, to determine all questions of settlement and affiliation, to search out recusants and enforce the law against them, and to see that Sunday was properly observed. He was the sole sanitary authority, the sole licensing authority (for all trades except monopolies), and the chief poor law and vagrancy authority. Such were some of the many duties under which Lambard groaned. And no slinking was possible, for at every Assize the Clerk of the Peace had to hand in a certificate giving the names of all Justices absent from Quarter Sessions since the last Assize, and the Judge had to examine into the cause of absence, and report thereon to the Lord Chancellor.¹

Yet there can be no question that on the whole the work was admirably done, and that social order was gradually evolved out of the weltering chaos of the fifteenth century. It was good for the country, and it was good for the Justices. Nothing is more striking than the contrast between the turbulent neo-feudalists of the fifteenth century—Percies and Nevilles and the rest—and the legally minded, Parliament-loving squires of the seventeenth century, the Pym, the Eliot, and the Hampden. The

¹ On the whole question cf. Hamilton, *Quarter Sessions under Elizabeth and James I*.

explanation of the contrast is to be found in the training and discipline of the Justice of the Peace under the 'dictatorship' of the intervening century

The
Parish
and the
Poor

In their administrative reorganization the Tudors, as we have seen, selected as their unit the Parish, and upon the Parish they thrust a new responsibility which from that day to this has been popularly regarded as its most distinctive work. A Parish is, now, for local government purposes, defined as a place for which a separate poor-rate is or can be made, or for which a separate overseer is or can be appointed¹. To accept poor-relief is in the vernacular 'to go upon the parish'. The popular phrase is characteristic of Tudor administration.

The sixteenth century witnessed an economic revolution into the details of which it is impossible to enter, but this one symptom of it, as closely concerning local administration, must be briefly noticed here. Throughout the whole period we have evidence of the anxiety of the Tudors to grapple with the problem of pauperism, vagrancy, and unemployment. Vagrancy and the crimes incident thereto are the first objects of their legislative solicitude, but, hand in hand with penal measures directed against 'lusty vagabonds' and 'valiant beggars', we have provision for 'poor, sick, impotent, and diseased people being not able to work' who 'may be holpen and relieved'. But the relief is to come from charity, the help from individuals. The State will exhort to good works, but hesitates to undertake them. There is considerably more than half a century of exhortation and experimental legislation before in 1601 the State, at last convinced of the inadequacy of voluntary effort, steps boldly in, and assumes a new and, as it was to prove, an almost overwhelming responsibility. It is the English way, in the main, a wise way. The great Poor Law of 1601, when at last it comes, is characteristic of Tudor thoroughness and method. Poor

The Poor
Law

¹ Cf. Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 4; Local Government Act, 1894 (56 & 57 Vict., c. 72), s. 75 (1); Poor Law Amendment Act, 1868, s. 18.

Relief is definitely recognized in principle as a matter of public concern, the *Parish* becomes the area of administration, the instruments are to be *Overseers* appointed and controlled by the *Justices of the Peace*. Funds are to be raised by a weekly rate levied parochially, and are to be applied for the benefit of three distinct categories

- (a) the 'lusty and able of body' who are to be 'set on work',
- (b) the 'impotent' poor who are to be relieved and maintained, and
- (c) the children who are to be apprenticed to trades, the boys till the age of 24, the girls to that of 21, or until marriage

This Act, as will be seen, is the foundation of the English Poor-Law system, and for a period of more than two hundred years governed the administration of Poor Relief. Under Charles II it was found necessary to define 'Parishioners', and the Act of Settlement, which inflicted great hardship on the poor, was the result. Early in the eighteenth century the system was overhauled, the cost of poor relief was mounting rapidly without adequate reason, and the result was an Act (1723) which provided for an enlargement of the area of relief, the formation of unions of parishes, the building of workhouses, and the imposition of a workhouse test. During the next half-century administration was greatly improved, but the last two decades of the eighteenth and the first three of the nineteenth century witnessed a terrible relapse. There was some excuse. The coincidence of the greatest economic revolution in world history, and a war, unusually prolonged, undoubtedly created problems, social and industrial, such as no administrators had ever had to confront before. Some of the legislation and most of the administration was undeniably due to a combination of panic and philanthropy—a fear lest the scenes of the Terror might be re-enacted in London, and a desire to relieve the suffering almost inevitably entailed by a period of rapid economic transition upon the weakest economic class. Gilbert's Act (1782) was a permissive measure passed to enable the

overseers to dispense with the 'workhouse test' and to make allowances in aid of wages to able-bodied labourers. The principles thus enunciated were carried farther and translated into action by a resolution of the Berkshire magistrates, adopted at a meeting at Speenhamland in 1795. This resolution, known as the 'Speenhamland Act', recommended the farmers to raise wages in proportion to the increase in the price of provisions. If the farmers refused, the deficiency was to be made good out of the rates. The example of Berkshire was followed throughout the greater part of England south of the Trent, and with disastrous results. Pauperism became endemic among the agricultural labourers, rates rose with appalling rapidity,¹ rent was swallowed up in rates, land not seldom went out of cultivation, worst of all, whole districts became hopelessly demoralized. It did not pay for a man to be industrious or a woman to be chaste. From a situation which, in the south at any rate, was threatening, England was saved by the Poor Law Amendment Act of 1834. This Act abolished, by a stroke of the pen, outdoor relief to the able-bodied, it imposed a rigorous workhouse test, it enlarged the area of administration from the Parish to the Union, it established a central Board of Poor Law Commissioners and systematic inspection in the hope of securing some uniformity of administration, it relaxed the Law of Settlement, and it committed the local administration of poor relief to Boards of Guardians, consisting partly of magistrates, who sat *ex officio*, and partly of guardians elected *ad hoc* by those who paid the rates. Thanks, in large measure, to the remarkable set of men into whose hands the central administration of the Act fell, it proved a conspicuous success. It restored to the working classes a sense of independence almost lost, it relieved

¹ The total expenditure on Poor Relief was

In 1760	£1,250,000 or 1/7 per head of population
1803	= £4,077,000 „ 8/11 „ „
1818	= £7,870,000 „ 13/1 „ „
1881	= £9,008,180 „ 5/10 „ „
1922	= £12,500,000, or over 20/ per head of population

property of an intolerable strain, it reduced rates and diminished pauperism

This chapter is, however, concerned less with the social and economic results of the Act than with its bearing upon local administration. It marks the first inroad upon the system established by the Tudors, the beginning of the end of the old order, which was based territorially upon the Parish, and in an administrative sense upon the County Magistracy. An administrative area, intermediate between Shire and Parish, reappears—that of the Union—and the principle of election as applied to local administrators takes its place by the side of the autocratic principle embodied in the Justice of the Peace.

That principle had been rapidly gaining ground during the period which intervened between the Poor Law of Elizabeth and the amending Act of 1834. Down to the end of the seventeenth century the County Magistracy had been held in check partly by the Crown and by the general application of the writ of *Certiorari*, which compelled the attendance of the magistrates to answer for their doings before the King's Court, partly by the existence of a large and powerful class of yeomen, small landowners, and big farmers, whose influence in local business was not yet swamped by that of the great territorial magnate. But with the Revolution of 1688 there dawned the brief day of the political and social ascendancy of the landed aristocracy. The imposition of a high qualification in landed property for the tenure of certain offices—for Members of Parliament, County Magistrates, Deputy Lieutenants, and Militia officers—made the discharge of administrative functions dependent for the first time upon the ownership of land. From 1688 to 1888 the County Magistrates had it all their own way in local administration, and their work was by general admission admirably done. It was efficient and economical. But, long before the great revolution was effected in 1888 and 1894, there had been a demand, increasingly articulate, for a radical reform of local government in the rural districts.

Reform
of Local
Govern-
ment

For this there were many reasons. Half a century had elapsed since the breakdown of the oligarchical system in the towns, and it was thought that the time for the application of a similar principle to county government was overdue. Moreover, the democratic idea has been waxing strong, as was proved, *inter alia*, by the Reform Acts of 1867 and 1884. Perhaps in consequence of the growth of political democracy, the State was every day assuming larger and larger responsibilities. Some of these the central government wished—and very properly—to delegate to local administrators. But most of the new functions involved financial responsibility, and it was contrary to the fashionable principles to entrust this to non-elected bodies. The principle of 'no taxation without representation' demanded that if the local authorities were to be charged with duties involving large expenditure, they must be directly responsible to the local taxpayer.

But there was a more potent and pressing reason for reform. During the last half-century local government had been sinking deeper and deeper into chaos. It was as Mr (afterwards Lord) Goschen said, a 'chaos of authorities, a chaos of jurisdictions, a chaos of rates, a chaos of franchises, a chaos worst of all of areas'. In 1883 there were no less than 27,069 independent local authorities, taxing the English ratepayer, and taxing him by eighteen different kinds of rates. Among the 'authorities' were Counties (52), Municipal Boroughs (239), Improvement Act Districts (70), Urban Sanitary Districts (1,006), Port Sanitary Authorities (41), Rural Sanitary Districts (577), School Board Districts (2,051), Highway Districts (424), Burial Board Districts (853), Unions (649), Lighting and Watching Districts (194), Poor Law Parishes (14,946), Highway Parishes not included in urban or highway districts (5,064), Ecclesiastical Parishes (about 1,300).

How had this 'jungle of jurisdictions'¹ arisen? For the last half-century Parliament had been busily at work attempting to adapt the existing framework of the adminis-

¹ Chalmers, *Local Government*.

trative system to the rapidly changing conditions of a rapidly increasing population. And this had been done, perhaps inevitably, by a long course of tinkering, piecemeal, legislation. No attempt whatever was made to fit in the new with the old. Act was piled upon Act; each involving new administrative functions and each creating a new authority to perform them. The result was an appalling mass of overlapping, intersecting, and conflicting jurisdictions, authorities, and areas, bewildering to the student and fatal to orderly administration.

Reform was imperatively demanded in two directions—(i) the concentration of authorities, and (ii) the readjustment and simplification of areas.

These may be regarded as the guiding principles of the Local Government Acts of 1888 and 1894. The former, popularly known as the County Councils Act, (i) provided for the creation of 62 'Administrative Counties', some of them coterminous with the 52 historic shires, but some representing subdivisions of the same, and sixty or more 'county boroughs'¹—towns with more than 50,000 inhabitants; (ii) set up in each county or county-borough a council consisting of (a) councillors elected for a term of three years by the ratepayers, (b) aldermen co-opted for six years from among the councillors or persons qualified to be councillors, but not exceeding in number one-third of the elected councillors; (iii) transferred to these councils the *administrative* functions of *Quarter Sessions*, such as the control of pauper lunatic asylums, of reformatory and industrial schools, local finance, the care of roads and bridges, the appointment of certain county officials, &c.; (iv) left to the *Justices of the Peace* all their *judicial* and licensing functions; and (v) committed to a *Joint Committee* of Justices and County Councillors the control of the county police force. To the above important functions of the County Council, subsequent Acts (1889 and 1902) have added that of the control of education, higher, secondary, and elementary; the duty

Local
Government Act
of 1888

¹ There are now (1925) 82 County Boroughs.

of dealing with distress under the Unemployment Acts (1905 and others), Old Age Pensions (1908), Public Health and Housing (1909, &c), Shops (1912 and 1913), War Pensions (1915) not to mention milk and dairies, cinematographs, allotments, small holdings, rivers' pollution, diseases of animals, and other matters

The Act of 1888, at once radical in scope and conservative in temper, has, in the main, more than fulfilled the anticipations of its authors. The county magistrates, instead of sulking at their partial dethronement, came forward with public spirit to assume a new role and new duties. To their experienced guidance is owing the fact that a profound transition has been effected without friction and without breach of continuity. The elected councils have in the main proved themselves, if not economical, undeniably efficient.

District
and
Parish
Councils

Complementary to the County Councils Act of 1888 was the District and Parish Councils Act of 1894. Every county is, under the latter, divided into *districts*, urban and rural, and every district into *parishes*. In every district and in every rural parish (with more than three hundred inhabitants) there is an elected council, in the smallest parishes there is a primary meeting of all persons on the local government and parliamentary register¹. To the parish council or meeting the Act has transferred all the civil functions of the vestries, the appointment of overseers and assistant-overseers, and the control of parish properties, charities, footpaths, &c. Ambitious parish councils have also the power to 'adopt' certain permissive Acts for providing the parish with libraries, baths, light, recreation grounds, &c. In some 10,000 out of the 14,578 parishes in England and Wales the Poor Rates the only rate levied. Of the 12,850 rural parishes some 7,200 have parish councils. Over purely ecclesiastical matters—including ecclesiastical charities—the vestry still retains control.

¹ This includes women and lodgers. Parishes of less than 300 inhabitants may have Councils, if they desire it. The smallest Parishes (under 100 inhabitants) must obtain the consent of the County Council.

The area intermediate between the County and the Parish has since 1894 been known as the District. The urban districts will be dealt with in the following chapter. The area of each county, exclusive of boroughs and urban districts, is divided into rural districts which roughly coincide with the area of the Poor Law unions. The Preliminary Census Report (1821) enumerated 672 rural districts in England and Wales, with an aggregate population of 7,850,857, or 20·7 per cent of the total population. Each rural district is governed by an elected Council, the members of which are *ex officio* the guardians of the poor for the rural parishes. In those parishes there are, consequently, no longer any separate elections for guardians. In addition to Poor Law functions there are various functions, chiefly in relation to Public Health, which may, or may not, be conferred upon a Rural District Council, on its own application, but at the discretion of the Ministry of Health. The Council is the local highway authority for its own district, it can build or provide working-class dwellings, control markets, protect rights of way and encroachments on roadside wastes, and it is obliged to see that every house in the district has a proper water-supply.

The Acts of 1888 and 1894 have unquestionably done much to bring order out of the chaos which had existed in local government for the previous half-century, and more recent legislation has shown an increasing tendency to simplify areas and consolidate authorities. Notably the Education Act of 1902, which abolished the *ad hoc* education authorities known as School Boards, and transferred their duties to the several councils of counties, boroughs, and districts. This tendency is in the main sound. The more varied and important the functions committed to the local governing bodies, the more likely are they to enlist the services of men of position, character, and independence. And on their doing so the future of local government obviously depends. Should they fail to attract such men and women the multiplication of responsibilities

and the concentration of powers can have only one result: the development of a local bureaucracy and the increased authority of a vast army of local officials. Signs of such a tendency are not lacking even now, and with the aggregation of population in urban areas it is probably inevitable; but it is one which must be carefully watched, for it is foreign to the genius and tradition which have made England pre-eminently the land of vigorous and independent local government.

XXXVI. LOCAL GOVERNMENT (2) URBAN

'There hardly can be a history of the English borough, for each borough has its own history'—F W MARIAND

'England is becoming more and more a collection of cities, and this has already wrought a marked change in the character and political temperament of her people'—A L LOWELL

'All tendency on the part of public authorities to stretch their interference and assume a power of any sort which can easily be dispensed with should be watched with unremitting jealousy. Perhaps this is even more important in a democracy than in any other form of political society'—J S MILL

NEARLY four-fifths of the people of England and Wales now dwell in towns. Two centuries ago more than three-fourths were country folk. According to an estimate of 1696 London and the other cities and market towns contained 1,400,000 people, or 24 per cent of the whole, the villages and hamlets contained 4,100,000, or 76 per cent. According to the last census (1921) the position has been reversed. London alone, with its 7,476,168 inhabitants,¹ had a population greater than the whole rural population of England and Wales two centuries before, while the town dwellers numbered in all 30,034,385, or 79.3 per cent of the whole, the country folk only 7,850,857.

The
urbaniza-
tion of
England

Thus is, beyond all comparison, the most portentous symptom of the social and political life of modern England, and it justifies a separate, though necessarily brief, treatment of municipal history and organization. There is historical justification as well. For the towns—cities and boroughs—have almost from the first presented certain anomalies and exceptions, though in a less degree than the *Comunidades* of Italy and France, to general rules of local government. Among English towns, again, the position of London has always been exceptional.

¹ This is the London Police District. The County of London contains 4,483,249 inhabitants, the City of London 13,706. The proposed 'Health Area' of London is estimated to contain between 9,000,000 and 10,000,000.

The
Burgh

Originally the burgh was, as Freeman put it, 'only that part of the district where men lived close together than before'. But the mere aggregation of population soon gave to the townships thus distinguished a differentiated organization. The aggregation was itself due to one of many causes, or to several in combination. Many towns, like London, sprang up on the tideway of great rivers at a point as remote from the sea as possible, others, like St Edmunds or St Albans, found a nucleus in the shrine of a saint whose fame attracted pilgrims, others, like Canterbury or Norwich, grew up under the shadow of a great monastic house, others at the junction of roads or at the fordable point of a river, like Hertford, others were artificially created for strategic reasons. The Danish invasions, in this way, gave an immense impulse to the foundation of towns. Oxford owes its origin to a combination of circumstances: the shrine of a saint (St Frideswide), a ford across the Thames, a nodal point on the old road system, a border fortress against Danish incursions.

But whatever the motive, religious, economic, or strategic, which brought men together, the mere aggregation necessitated or at least suggested a complete organization than that which sufficed for the rural townships. That organization reflected the amalgamation or conflict of three different elements or ideas: the agricultural, representing the Anglo-Saxon tun or burgh, with its Folkmoot, the feudal, typified by the Court Leet, and the commercial, by the Merchant Guild. These ideas were, to a great extent, successively dominant in the town-life of early England. At first the urban township was differentiated from the rural townships around it only by size and numbers. Like the latter it might be either independent or (much more often) 'dependent', i.e. in the soke of some lord. Before the Norman Conquest all towns, whether originally 'dependent' or not, had passed either into the 'soke' of a lord or into the demesne of the King. As a rule the organization of the towns was assimilated rather to that of the Hundred than of the Township, but (except in

the case of London and other 'Counties of Cities') they were subject to the jurisdiction of the sheriff and the Shire Court

The great ambition of these incipient municipalities was to obtain independence, fiscal and judicial, from the local authority of the sheriff and the shire

This they accomplished by slow degrees and in a variety of ways. The most obvious method was to obtain from the lord in whose demesne the town lay a recognition of local customs embodied in a *Charter*. Such a privilege was not of course granted without valuable consideration. The first step was, as a rule, to get immunity from the jurisdiction of local courts and a recognition of the right to hold courts of their own, the second was fiscal independence. This latter was secured in two stages. In the first place, a body of the wealthier inhabitants would compound with the sheriff for the payment of dues, would undertake to 'farm' the borough. In the second, the town would acquire the right of paying this *firma burgi* direct into the exchequer without the interposition of the sheriff. Another stage towards independence was marked by the acquisition of the right of electing their own magistrates, then bailiffs or reeves, or even in a few cases a mayor. London, far ahead of other towns in this as in other ways, got a sheriff of its own under Henry I, a mayor under Richard I, and the right of electing the mayor by the Great Charter of 1215. Thus London gave the lead, and only after long intervals were other towns able to follow it. Another highly prized privilege was the recognition of the Merchant Guild or Hansa, with its extensive powers for the regulation of trade.

The precise relation of the Merchant Guild to the municipality is a technical and indeed highly controversial question with which we are not concerned¹. But this much must be said: the Merchant Guild was, in most towns, an exceedingly influential association of traders,

Borough
Charters

The
Merchant
Guild

¹ Cf. Cross, *Gild Merchant*, Dentano, *English Guilds*, Ashley, *Economic History*

who in a corporate capacity did much to stimulate and assist the evolution of municipal independence. Still, the Guild must not be identified, either in theory or fact, with the *Communa* or municipality. The former was a powerful adjunct to the latter but was not the less distinct from it. As early as the time of Henry I the Merchant Guild was frequently specified as one of the privileges secured to a town by Charter, such was the case with Leicester (1107), with Beverley (1119), and with York (1130). It is definitely proved to have been established under the Angevins in no less than 102 towns—practically in every town of importance outside London. Bishop Stubbs is doubtless right in his assertion that in the twelfth century the possession of a Merchant Guild was 'a sign and token of municipal independence', but neither then nor at any time did it cover the whole field of municipal activity. It was, as Mr. Gloss says, a 'very important but only a subsidiary part of municipal administrative machinery', concerning itself primarily with the regulation of trade, owning property which was distinct from municipal property and governed by officials who were not identical with those of the municipality. That there was a tendency, in some cases irresistible, for the two organizations in time to merge is undeniable, but they must not therefore be regarded as substantially and universally identical. As the Merchant Guild tended more and more to absorb the government, the specialized trading interests began to be relegated to the Trade or Craft Guilds. Their functions, however, were unequivocally economic and must not occupy our attention here.

Municipal
Corporations

Meanwhile, there developed by slow degrees the modern idea of a municipal 'corporation'. 'Incorporation' was sometimes accomplished by statute, but more often by Royal Charter, as it still is. In this way the town became a legal 'person', with the rights appertaining thereto: the right of perpetual succession, of holding land, of using a common seal, of suing and being sued, and of making by-laws. But this legal conception was not fully worked

out until the close of the fifteenth century. By that time there were some 200 'boroughs' or towns incorporated by Charter with a defined though not uniform constitution. For herein lies the main difficulty of English municipal history. 'There hardly can be a history of the English borough,' as Matland pithily phrases it, 'for each borough has its own history.' Bearing this caution in mind we may say broadly that by the end of the fifteenth century the typical municipal constitution had been evolved: 'an elective chief magistrate, with a permanent staff of assistant magistrates and a wider body of representative councillors'—in other words, 'the system of mayor, alderman, common council which with many variations in detail was the common type to which the Charter of incorporation gave the full legal status'.¹

Already, however, a strangely oligarchical tendency had revealed itself. The governing bodies were as a rule self-elected, and in the management of town business the ordinary burgess had little or no part. This tendency became still more strongly marked in the sixteenth and seventeenth centuries. In the creation or restoration of parliamentary boroughs there was an increasing tendency to vest the election of members in the 'close corporations'. The later Stuarts attempted to make the practice uniform. Writs of *Quo Warranto* were issued, ancient Town Charters were forfeited or surrendered wholesale, and in the remodelled municipal constitutions the right of electing members to the House of Commons was vested in corporations nominated by the Crown. Some of the old Charters were restored after the Revolution, but not all, and town government became, therefore, as we have already seen, increasingly narrow and oligarchic down to the Municipal Reform Act of 1835.

With the passing of that Act we get for the first time on to really firm ground. By its provisions the municipal constitutions of all boroughs except London and Winchester were remodelled on a uniform plan. The governing

Municipal
Reform
Act, 1835

¹ Stubbs, iii. 585.

authority is now a Council consisting of a varying number of members elected for three years by the whole body of ratepayers, men and women. The Council annually elects a mayor, and also elects a body of aldermen who hold office for six years. The number of aldermen thus elected must not exceed one-third of the number of councillors. The main work of the council is discharged in a number of standing committees which, like the council itself, are assisted by a staff of permanent officials of which the chief is a town clerk. Upon this functionary, his public spirit and ability, the administration of municipal affairs very largely depends. The other officials vary in different towns, but among them are generally found a chief engineer, a sanitary officer, a medical officer, an education secretary, a treasurer, and (where the town has a separate police force) a chief constable.¹

There are now about 335 municipal boroughs in England and Wales, but they vary enormously in status, size, and population. Birmingham, for example, had (1921) 919,438 inhabitants, Winchester had 693, thirty-nine had, at the same date, a population of over 100,000, sixty-seven had less than 5,000.

Cities and
Boroughs

They differ also in status. We may notice, first, the distinction between 'cities' and 'boroughs'. This is merely complimentary—a distinction of name. How has it arisen? It is generally supposed that a city is a borough which contains a cathedral and the seat of a bishop. But there seems to be no legal sanction for this view. Ely and St. Davids are 'cities', but neither is a municipal borough. Linc. and Wakefield, after the creation of bishoprics with a seat therein, were raised to the rank of cities, but to effect this a Royal Proclamation was required. A similar distinction has been in the same way conferred upon boroughs like Nottingham which are not episcopal sees. Ag. and Oxford and Gloucester were distinguished as *ciuitates*.

¹ The late Mr. Howell, after studying a number of English cities was led to remark that the excellence of municipal government was very roughly proportional to the influence of the permanent officials, but that view would not be universally accepted.

ates in Domesday, but neither was the seat of a bishopric until the reign of Henry VIII. If we are compelled to generalize, we can hardly go beyond two propositions: (1) that a town (whether 'borough' or not) which is the seat of a bishopric, is entitled to be or to be created a 'city', (2) that the same power, that of Royal Proclamation, which confers the dignified title upon an episcopalized town, may also confer it upon any other town.

We pass to the surer ground of legal status. Legally, municipal boroughs may be distinguished as: (1) Counties of cities or towns, (2) 'County' boroughs, (3) Boroughs with a separate Court of Quarter Sessions, (4) Boroughs which have, and (5) Boroughs which have not, a separate Commission of the Peace, (6) Boroughs which have, and (7) Boroughs which have not, a separate police force.

The first category is historic. There are nineteen ancient boroughs which have long possessed all the organization of a county and which for certain purposes, notably the administration of justice, are deemed to be separate counties. These are distinguished by possessing a sheriff of their own.¹ Bristol, Canterbury, Gloucester, Chester, Exeter, Norwich, and York are typical of this class.

Sharply to be distinguished from them are the county boroughs, now eighty-two in number, which are the creation of the Act of 1888. 'The same place may be both a county of a city or town, and a county borough, though most county boroughs are not counties of towns, while a few counties of cities or towns, such as Lichfield and Poole, are not county boroughs.'

The Act of 1888 provided that every borough which had or should obtain a population of 50,000² should for administrative purposes be treated as a separate county. The council of such a borough is for all practical purposes a county council, while the borough itself is wholly independent, financially, administratively, and judicially, of the county or counties in which it lies.

¹ Oxford has a sheriff, but it is not a county of a city, and its sheriff does not act as returning officer.

² And for historical or other special reasons a few others.

London
Govern-
ment

This is perhaps the least inappropriate place to speak of one town, which is, as it always has been, unique among English cities. London, as regards the square mile of the 'City', shares with Winchester the distinction of having escaped the hand of the reformer in 1835. London outside the City was, down to 1888, merely an aggregate of parishes governed like the tiniest country parishes by their vestries, but subject, in certain matters, to the control of a central authority known as the Metropolitan Board of Works. The Local Government Act of 1888 abolished the Board of Works and transformed extra-city London into an administrative county under a county council. Upon this council were conferred powers similar to those of other county councils but enlarged and adapted to the more complex conditions of urban life. A later Act of 1899 transformed the vestries into metropolitan boroughs, of which there are twenty-eight, each with its mayor, aldermen, and councillors like any provincial borough, but with less financial independence, being controlled on the one hand by the Ministry of Health, on the other by the London County Council.

The brand-new bodies brought into being by the Acts of 1888 and 1899 have wrought a marvellous change in the Metropolis, alike in outward visible form and in administrative symmetry. The County Council has been the object of much criticism, the local boroughs of some ridicule, but both are what Londoners make them and neither ridicule nor criticism has done harm.

The City

By the reforms of 1888 and 1899, as by that of 1835, the historic 'City' of London was untouched, it has been often threatened but it is not now likely to encounter perils so great as those it has survived. For many centuries London afforded the model to which other cities were always striving to attain. Already by the time of the Norman Conquest it had acquired the organization of a shire. It got its *Communa* with a mayor and a small body of aldermen in 1191, and the right of electing the mayor in 1215. At this time the Corporation consisted of

a mayor, twenty-five aldermen of the wards, and two sheriffs. Before the close of the century, twelve elected common councillors had come into being to assist the aldermen in their several wards. Superimposed upon or rather intermingled with the municipal organization or *Communa* was that of the Merchant and Craft Guilds. From them come the liverymen of the Companies. By Edward IV the constitution was further defined, and the formal 'incorporation' of the City completed. The mayor, sheriffs, and parliamentary burgesses were to be elected by the liverymen and the common council, the aldermen were to be elected for life, one for each of the several wards. This constitution has subsisted, unchanged in essentials, from that day to this.

Of non-county boroughs there are now 253, and these may again be subdivided into various categories.

Non-County Boroughs

Boroughs with a separate Court of Quarter Sessions belong for certain administrative purposes to the county, but for most judicial purposes are independent of it. Inclusive of county-boroughs, boroughs with separate Courts of Quarter Sessions number 116. They are distinguished by the possession of a Recorder, who is the Judge of the Court of Quarter Sessions, and of a Clerk of the Peace, and, as a rule, by the right to elect their own coroners. Another class of non-county boroughs consists of those which, though not endowed with a separate Court of Quarter Sessions, have a separate Commission of the Peace or Borough magistracy. Others again have only a separate police force. But these are merely matters of administrative convenience which do not greatly affect the status of the boroughs nor demand further explanation.

There remains yet another class of boroughs, ancient, proud, but in population insignificant and not endowed even with a separate police force. They may indeed retain their own Quarter Sessions and Recorders and a separate Commission of the Peace. But should they elect to do so they must pay heavily for their dignity since they are not thereby exempted from contributing to the

judicial expenditure of the county All boroughs which at the census of 1881 had populations of less than 10,000 belong to this category, and by the Act of 1888 they were deprived of most of their powers and functions which were handed over to the County Councils, to whose expenses these small boroughs must contribute Among them are many old parliamentary boroughs situated mainly in the south and west of England, such as Abingdon, Arundel, Bodmin, Calne, Malmesbury, Wallingford, Winchelsea, and many others which have played, in their several ways, a part in history and are justly jealous of their ancient dignity

Urban
Districts

In striking contrast with the ancient boroughs, and sharply to be distinguished in status from all classes of municipal boroughs, yet closely akin in administrative functions to non-county boroughs, are the new Urban Districts They represent part of the simplifying process carried out under the Act of 1894, and, including boroughs, now number 1,126

Like the rural districts they are governed by elected Councils consisting of one councillor for each parish of 300 population Certain powers and duties the Urban District Councils share with the Rural Councils, others are peculiar to the Urban Councils, while others again depend on the population of the particular Urban District To return to the municipal boroughs

Powers
and
Func-
tions

The powers and functions of municipal authorities are wide, and constantly increasing Generally speaking, they may be said to be responsible for public order, for public health, housing, and for elementary education But few boroughs, especially large boroughs, are content with the performance of these elementary duties They may acquire further powers in three ways (a) by 'adopting' one or more of the innumerable 'permissive' Acts already on the Statute-book, (b) by obtaining special 'Private Acts', or (c) by obtaining from the Ministry of Health 'Provisional Orders' In one or other of these ways they may be authorized to provide water, gas, electricity, markets, cemeteries, gymnasiums, housing accommoda-

tion, baths and wash-houses, tramways, public libraries, parks, bands, museums, golf links, and many other amenities, conveniences, and necessities of modern social life.

How far it is expedient that public authorities should undertake these and similar enterprises is one of the most highly disputable questions with which the modern citizen is confronted. Nor can it be dogmatically answered. But it is too important to be ignored, and one or two considerations may, therefore, be suggested.

In the first place a distinction may be drawn between necessities and conveniences, and another between services and commodities. Water, for example, is a necessary; the supply of it is limited, but apart from the initial enterprise of obtaining an abundant and pure supply, no great skill is demanded in the provision of it. In cases where private enterprise has procured such a supply—good, abundant, and cheap—there is no pressing reason why a municipality should desire to acquire it: but equally there is no special reason against it. If the private supply is impure, insufficient, or expensive, a municipality is bound to intervene and obtain a monopoly. For obvious reasons there cannot, in an ordinary town, be two competing water systems. Similarly in regard to drainage. This also is a matter of public health, and any system must be universal. No sane person would wish to revert to an individualistic scheme of drainage. Artificial light is almost as much a necessity as water; should the supply of it also be, therefore, a municipal monopoly? Here a distinction creeps in. Every citizen requires water; but not every citizen requires, for private consumption, gas. He may prefer another illuminant: electric light, oil, or candles. If, however, the municipality owns and manages the gas works, he may have to wait for some time before he is permitted to obtain electric light. This apprehension has a basis of proved fact. Parks and open spaces may fairly be deemed necessities to public health; museums and free libraries desirable if not indispensable adjuncts to public education; but between these and

Neces-
saries
and Con-
veniences

municipal golf links there seems to be a distinction. Amusement and exercise may be as indispensable as open spaces, but it is a matter for argument whether it be the business of the public authority to supply them

It seems desirable at this point to set forth as briefly and dispassionately as possible the arguments which are urged for and against the extension of municipal activities and responsibilities, for and against what is popularly known as 'municipal trading'

Municipal
Trading

On behalf of municipal trading it is urged (1) that certain fields of commerce are virtually monopolies, and that monopolies with their vast potential profits ought not to be vested in individuals or private syndicates or associations, (2) that in matters which though not monopolistic are still of great and general importance to the health or well-being or convenience of the community, the municipality, as representing the community, should intervene to mitigate the 'greed' of the private trader and should, by underselling him, cheapen the commodity to the consumer the provision of means of transport, of working-class dwellings, &c, may be held to come under this category, (3) that it is the duty of public authorities to improve in every possible way the conditions of manual labour, to act as a 'model employer', to employ labour always under model conditions, to pay the union rate of wages, and so forth, and (4) that since public authorities can raise capital on more advantageous terms than private traders, it is an actual economic disadvantage to leave large enterprises in private hands

These arguments clearly demand serious consideration but this is not the place for exhaustive discussion, a few words must suffice (1) As to monopolies The number of these, when closely scrutinized, is fewer than is commonly supposed Real monopolies may properly be left to municipalities, but how many are there? No town could tolerate more than one gas supply, gas is sufficiently monopolistic to justify and require that the conditions under which it is supplied to the public—its quality, price,

and so forth—should be under the closest public scrutiny ; but it is at least a matter for argument whether the public authority is not better occupied in controlling the purveyors than in directly manufacturing and distributing the commodity. Similarly in regard to means of public locomotion, involving, like tramcars (but not motor omnibuses) the concession of a virtual monopoly. (2) In regard to the supply of necessities which are not monopolies. Is it the duty of the public authority to intervene between the greed of the private capitalist or trader and the well-being of the community ? It is difficult to give any general answer to this question, other than to say that it must depend on circumstances. Take the case of working-class dwellings. An enterprising municipality is invariably confronted by this dilemma. The provision of such dwellings is either a remunerative investment or it is not. If it is, it is quite certain that it will be undertaken by private 'speculators', and it is highly probable that, if the profits are excessive, they will be reduced to a fair level by competition. There may be exceptional cases in which these conditions are temporarily or even permanently not fulfilled. In such cases no one would demur to the enterprise of the municipality. But it may be that the investment is commercially unremunerative. What under these circumstances is the duty of a public authority ? If it houses the workmen at unremunerative rates it is clearly providing exceptional advantages for one class at the expense of another. Does it not do the same in the case of education ? And if it may provide education for the young, why not housing both for the children and their parents ? It may be answered that it educates the children not in their interests, but in those of the community. And, moreover, the provision of education is universal. It is open to all. Housing schemes are in practice partial. But if the supply of municipal houses is strictly limited, how are the privileged tenants to be selected ? Who are to be housed at the expense of the ratepayers at large ? If, on the contrary, the scheme is on a large scale, the elected

municipality will become the landlords of a large body of its constituents. The situation thus created would not be free from difficulty. If the relation is on a purely commercial basis, if the houses are let at rack rents, little harm will be done, but also little good. If they are let at anything less than the commercial rent, a body of privileged tenants is necessarily created. And that way danger lurks. (3) But if there is danger to purity of municipal government in the existence of a body of municipal tenants, is there none in the existence of municipal employees? The provision of services, still more the production and distribution of commodities, necessarily involves the employment of labour. There are those in England who would like to extend the scope of municipal activities, but who hesitate to do so because they discern the danger inherent in the creation of large bodies of municipal employees who are practically the masters of their employers. To disfranchise them is evidently impossible, even were it consonant with social justice. But it is a matter for consideration whether, in the higher interests of the State, it may not be necessary to devise an electoral scheme under which such voters would be withdrawn from local constituencies, and grouped into constituencies of their own.

There remains to be considered the purely economic argument that it is an actual economic disadvantage to leave large enterprises in private hands when public authorities can raise capital on more advantageous terms than private traders. That for certain purposes they can do so is undeniable. But two questions demand an answer. Is it certain that this advantage will be maintained? As long as local authorities confine themselves to enterprises which old-fashioned people regard as 'legitimate', it is probable that it will. The security is clearly superior to that which any individual can offer. But if the municipalities embark on speculative enterprises, if they take the risks which are incidental to private trade, however conservative its conduct, they may lose their advan-

tage in the money market. At present they have an advantage of something less than 1 per cent. A first-class industrial concern can borrow on debentures at about $5\frac{1}{2}$ to 6 per cent. Birmingham, Liverpool, and Manchester have to pay about 5 per cent.¹ But another question arises. Assuming that capital can be borrowed to this extent cheaper, will it be employed to equal advantage? Capital charges are no doubt a serious item in any large undertaking, but they are trifling as compared with the wages bill. Increased cost of labour or management on the one hand, deficiency of output on the other, may very soon counterbalance any advantage secured from cheapness of capital. And no one contends that municipal management, however efficient, has yet proved itself to be economical.

The facts, however conclusive the explanation may be, are in themselves indisputable. The liabilities of local authorities in England and Wales in 1875 stood, in round figures, at £92,820,000, in 1905 at £482,984,000, in 1921-2 at £704,000,000. Nor has there been any corresponding increase either in population or in rateable value. The population (in 1871) was 22,905,000, in 1901 it was 32,526,075, in 1921-2, 37,885,242. The debt per head was in 1875 £4 per head of population, in 1905, £15, in 1921-2 it was £18 11s 7d. In 1871 it was about 16s per £1 of rateable value, in 1905 it was about 44s, in 1921 it was nearly 66s.

It is contended that these vast liabilities are represented by corresponding assets, that the capital expenditure has been to a great extent upon remunerative undertakings. It is not easy to test the accuracy of this contention, nor to measure its force. Hostile critics cast a good deal of suspicion upon the methods of municipal book-keeping, and suggest that the application of a commercial audit would reveal the fact that these 'remunerative' enter-

¹ Local authorities when raising by 'Housing Bonds' large sums for housing schemes in the years after the war had as a rule to pay 6 per cent, and may have to offer a similar rate of interest if they again become large borrowers for similar purposes.

prises are actually conducted at a loss. The point is too technical for more than a passing reference in these pages, but one test may perhaps be suggested. If these municipal enterprises are really remunerative, the benefits ought to be perceptible in a diminution of annual expenditure. But of this there is no indication. On the contrary the rates raised in 1875 amounted to £19,000,000 or 3s 3½d in the £ of valuation, or 16s 2d per head of population. In 1905 they amounted to £58,000,000 or 6s 1½d in the £, or 34s 1d per head of population, in 1921-2 to £170,871,876 or 14s 7½d per £ of assessable value, or £4 10s 2d per head of population. These facts so far as they go speak for themselves. But though indisputable they do not close the argument. We may be getting good value for the money spent, capital expenditure may be remunerative in the larger, if not in the narrower sense, expenditure may be justified by the increased intelligence and longevity, the enhanced economic efficiency, and the improved moral and physical condition of the great masses of our urban populations.

Two things, however, may be demanded of those who advocate the extension of municipal activities. They must show, first, that this increase, enhancement, and improvement has actually taken place, and, secondly, that it has not been purchased at too high a price, not in the economic, but in the moral and political sense. These things are not easily measured, proved or disproved. That there has been improvement along certain lines no one with a discerning eye and an understanding heart can question. Does the balance incline that way? Or do the more subtle disadvantages outweigh the more palpable benefits? It is men, not officials, who make the greatness of states, not machinery, however perfect, but the personal initiative of individuals.

One point remains to be noticed. We have now described the organization of the Central and of the Local Government. What is the nature of the connexion between them? Incidentally we have touched it at many points, but it needs to be described more explicitly.

There are two features of recent political development in England which are at first sight contradictory. On the one hand we have seen the enormous progress made in local administration—its systematization, its extension, and the multiplication of its activities. But coincidentally with this we have to note the increasing interference of the central government in local affairs; the expansion of the work of the Ministry of Health, of the Home Office and the Board of Trade, and the creation of a small standing army of inspectors, entrusted primarily with the duty of seeing that the rules of the central authority are carried out by the several local authorities. The reformed Poor Law of 1834 provided the model. The widely divergent principles, on which, prior to 1834, the Poor Law was administered in different localities, suggested the advisability of a central Poor Law Board to secure some semblance of uniformity, and to maintain a standard of efficiency. The Poor Law Board developed into the Local Government Board, and the Local Government Board into the Ministry of Health. The example it set was extensively followed; at the Home Office, for example, in regard to factories, mines, and prisons; at the Board of Trade, the Board of Education, the Board of Agriculture, and elsewhere.

But although in all these matters the hand of the central government is increasingly felt, and the work of inspection is close and efficient, the greater local governing bodies are subjected to curiously little restraint. This is, no doubt, in harmony with the genius and tradition of our people. 'We have in England', says Mr. Percy Ashley, 'traditional ideas as to the autonomy of local communities which are the outcome of our political and constitutional history.' In England, as we have seen, the central government is the child of local government; in France and Prussia, on the contrary, it is the parent. This is a great and essential difference which has left a profound and permanent impress upon our institutions, and still more upon the spirit of our administration. 'The influence of the historical tradition is so strong that the English citizen probably

still has some conception of local government as a right with which no central power may properly interfere.¹

Nevertheless the local authorities are by no means free to do or leave undone as they will. The central government is alert both to restrain and to stimulate. The control of the central over the local government is three-fold—judicial, legislative, and administrative. Local authorities are in no real sense autonomous, if they exceed their powers or neglect their duties, they may find themselves in conflict with the law, with Parliament, or with one or more central administrative departments.

Judicial
Control

The responsibility of officials to the law is, as we have seen, a characteristic feature of English public life. It is a result of the absence of that system of 'administrative law' which gives to the executive of so many other countries peculiar privilege and authority. In England all local officials are amenable to the ordinary law of the land, and for any violation of the law must, as a rule, answer before the ordinary tribunals. But this is a responsibility which they share with the officials of the central government, from the Prime Minister and the Lord Chancellor downwards.

Parlia-
ment and
Local
Govern-
ment

The control of Parliament over local bodies is exercised by legislation of four different kinds.² (1) *Constituent Acts*, which 'create the various classes of local government authorities and arm them with the powers necessary for the fulfilment of the duties intended to be discharged by them'. Such were the Local Government Acts of 1888 and 1894, already described. (2) *General Acts*, giving power to local authorities generally to deal with a specific subject, such as public health or education. (3) *Adoptive Acts*. To this device, a favourite one with the English Parliament, incidental reference has already been made. An 'adoptive' Act is a permissive measure which local authorities may adopt or not, as they choose. A familiar

¹ Ashley, *Local Government*, p. 4.

² I follow here the categories of and quote freely from Mr. Percy Ashley's admirable chapter on the subject in *Local Government*, c. 17, § 2.

instance of such legislation is the Public Libraries Act of 1892. As a rule such Acts can be adopted only after a *referendum*, or direct poll of the ratepayers. The method has its advantages and its dangers. It gives opportunities for the trial of experiments, it stimulates, by the *referendum*, interest in local affairs, but it tends to penalize financially the more progressive localities. Adoption on a large scale generally means high rates, high rates mean high rents, and high rents accentuate the housing problem. (4) *Private Acts*, the method and operation of which have already been described.

Provisional Orders represent, as we have seen, a half-way house between legislative and administrative control over local authorities. They must be obtained through a Department, but sanctioned by Parliament. If unopposed they afford a decidedly cheaper method than private bill legislation, and a less precarious one. But the conditions—especially the financial conditions—imposed by a Department are not infrequently more exacting than those imposed by a select Committee, and some local authorities prefer on that account the more elaborate and more immediately expensive method.

Is the control exercised by the central over the local government adequate? The question is not an easy one, and will be variously answered. There are, on the one hand, those who, for reasons already adumbrated, resent any interference on the part of the central government with the governing bodies of important localities. The inhabitants, for example, of Manchester, Liverpool, and Birmingham think, and with some reason, that they are at least as competent to manage local affairs as any Government Department in London. On the other hand, there are those who would like to see some more effective check than at present exists upon the spending and borrowing proclivities of ambitious local authorities. Even now, no loan can be raised without the sanction either of Parliament or of the Ministry of Health. The latter control is the more effective, since the Ministry satisfies itself that proper

Adminis-
trative
Control

provision is made for repayment. But many contend that even this is inadequate and that nothing short of a regular audit, at the hands of an officer of the central Department, will secure effective control over the vagaries of local accountancy.

Taxation
and
Representa-
tion

But the difficulty goes deeper. There is a divorce already serious between local representation and local taxation. Rates are in too many cases half concealed by rents, owing to the fact that the rates are paid by the landlord and not the tenant. In Birmingham, for example, it was estimated by the town clerk that from 70 to 75 per cent. of the inhabitants were 'compound householders', i.e. lived in houses on which the landlord paid the rates. In London nearly half the municipal voters are not direct ratepayers. This is a serious danger, and one which, even at the expense of some administrative inconvenience, ought not to be allowed to continue.¹ But if there are many municipal electors who feel no direct responsibility for the financial policy of their representatives, so there is much ratepaying properly which is unrepresented. This is due to the development of joint-stock companies. There are, for example, some parishes in which almost the whole of the rates are paid by a single railway company. The great Railway Companies pay over £7,000,000 a year in rates, and have no representative on any of the bodies to which they are paid. In Manchester and Liverpool practically one-third of the rateable hereditaments are in the hands of corporations or companies without a vote between them.² There are, therefore, at least three dangers to which municipal government in England is, at present, exposed: the multiplication of municipal activities may bring about an undesirable correspondence between candidate and elector on the one hand and employer and employed on the other, the extension of joint-stock enterprise may widen the divorce between local

¹ It is one of the many excellent rules of the Co-operative Tenants Society that every tenant shall pay his rates directly.

² Avebury, *Municipal and National Trading*, c. 7.

taxation and representation ; and, finally, an excessive demand upon unpaid services may disgust the elected local administrator and throw increased responsibility and power into the hands of the local bureaucracy. To the gravity and reality of these dangers no thoughtful citizen can be blind.

It is consolatory to find that competent and impartial observers can still bear testimony to the purity and efficiency of English local government, although it is true that one such observer both friendly and competent holds the opinion that the personnel of the representative local bodies shows signs of deterioration.¹ That is disquieting, even though he appears to find more than counterbalancing advantage in the improvement of the permanent officials. The officials are, beyond question, increasingly zealous and efficient ; but no one who is imbued with the genius of English local government would regard this as a satisfactory set-off against a deterioration in the quality of the elected representatives on local governing bodies. On this point it is difficult to reach a conclusion ; but if it be true, no countervailing improvement in mere administrative efficiency will long retard the decay of those local institutions which for centuries have formed the nursery of political liberty in England.

¹ Lowell, *Government of England*, ii. 180, 199.

XXXVII THE COMPOSITE STATE

Personal Unions and Confederations *The United Provinces of the Netherlands*

'Federal Government is no more than a prolongation into the sphere of general government of the principle of local self-government with which all Anglo-Saxons are familiar. It is created by the same kind of division of powers, it operates in the same way, each government supreme and independent within its own sphere and each acting upon all citizens alike'—GEORGE BURTON ADAMS, *Federal Government*

'Federalism is a natural constitution for a body of States which desire union and do not desire unity'—A. V. DICKEY

'La République des Provinces Unies était une fédération d'états plutôt qu'un état fédératif'—LAVALLÉE

'It is very probable that mankind would have been at length obliged to live permanently under the government of a single person had they not contrived a kind of Constitution that has all the internal advantages of a republican, together with all the external force of a monarchical government. I mean a confederate republic. This form of government is a convention by which several petty states agree to become members of a larger one which they intend to establish'—MONTESQUIEU

IN attempting to discover for the classification of modern States a basis more logical, more differentiating, and more appropriate to modern conditions than the categories inherited from Aristotle, the suggestion was hazarded that States might be classified as unitary and federal, simple or composite. The subsequent course of the narrative has involved frequent reference to a number of States belonging to both categories. As yet, however, no attempt has been made to draw out systematically the essential principles which lie at the root of these two distinct types of State. That task can no longer be deferred.

Sir John Seeley demurred to this new basis of classification, to which he found the same objection as to the distinctions of monarchy, oligarchy, and democracy. To

The classification of States

Federalism and Local Government

him it seemed 'too purely formal and verbal' He denied, in fact, that between the unitary State and the federal State there is any fundamental difference in kind', he denied that 'the one is composite in any sense in which the other is simple' The difference, he held, was one of degree, not of kind, and depended on the extent to which the principle of local government was carried

With all deference to a great historical teacher I am constrained to insist that, on the contrary, the distinction is one of kind and not merely of degree England, as we have seen, is pre-eminently the land of vigorous local government, yet the basis of English government (using 'English' in the narrowest sense) is essentially unitary The component States of the American Union—and in particular the new England States—have closely followed English traditions in the matter of local government, yet they have agreed to form parts of a greater whole, conceived not in a unitarian but in a federal spirit The existence of vigorous local governments is, then, consistent equally with the federal and the unitary type of government, but it has no special relation to either France and England, for example, are alike in being unitary States, but of local government, as Anglo-Saxons understand it, France is almost innocent On the other hand England and France are sharply differentiated from States like Switzerland, Canada, the United States, Germany, and the Australian Commonwealth, which, though endowed with differing types of federal government, are all undeniably federal in form

We are impelled, then, to examine more closely and systematically than has hitherto been possible in the present work, the meaning and implications of Federalism

Growth
of Federal-
ism

On the threshold of the investigation one fact obtrudes itself The principle of Federalism may be sound or unsound, it may represent, as some contend, a clumsy contrivance for 'papering over political cracks', or, as others hold, it may contain the germ of a political experiment more hopeful for the future of mankind than any of which the

world has hitherto had experience. Be that as it may, this much is certain that the principle has within the last sixty years exhibited extraordinary vitality, and has been more widely applied than at any previous period in world-history. When Mr. Freeman embarked, in 1863, upon the task of writing the history of Federal Government, he could rely for illustration of the principle upon only three conspicuous instances among the States of the modern world: the United Provinces of the Netherlands, the United States of America, and the Swiss Confederation, and of these the first afforded a very imperfect example of Federalism, while the last was still short of the perfect form attained in 1874. As a fact almost the whole of Freeman's uncompleted work was devoted to an analytical examination of the 'Leagues' among the ancient Greek States. In the sixty years which have elapsed since the publication of Freeman's to-day there have come into being the Federal Dominion of Canada, the North German Confederation, subsequently developed and expanded into the German Empire, and the Commonwealth of Australia, not to mention the federal republics, too frequently neglected by the Constitutional jurist, of Central and Southern America.

Another point in connexion with the recent history of Federalism is not less remarkable than its rapidly extending application. Not only have more and more States adopted this form of government, but, in the States which have adopted it, there has been an intensification of the principle. Centripetal forces have almost everywhere gained at the expense of centrifugal. Take the federal Republic of Switzerland. The Cantons, as we have seen, still jealously maintain their traditional autonomy, the forest communities still adhere to the primitive methods of direct democracy, and have indeed infused the whole federal Constitution with something of their own faith and practice, yet even in Switzerland the centripetal principle is unmistakably asserting itself. In the United States of America, still more markedly in Germany, and even in

Centripetal
tendency
of Federal
States

Australia, the same tendency is observable. In the Netherlands State individualism has almost disappeared.

Composite States, which have not adopted the federal principle, have exhibited, on the contrary, a marked tendency towards disruption. The union which subsisted between Norway and Sweden from 1814 to 1905 was not genuinely federal but personal. The same is true of Austria-Hungary. In neither case has union survived. The tie which united Ireland to Great Britain under the Gattin Constitution (1782-1800) was hardly more than personal, and it is difficult to resist the contention that in 1800 the only alternative to separation was that which Pitt adopted.

May we, then, infer that a bias towards integration is inherent in all genuinely federal Constitutions? The temptation is strong, and would seem to be encouraged by what formal logicians know as the 'method of agreement and differences', but it must at least be resisted until we are in a position to decide what Federalism really implies.

What is
Federal-
ism?

What, then, is Federalism? 'A Federal Commonwealth', writes Freeman, 'in its perfect form is one which forms a single State in its relations to other nations, but which consists of many States with regard to its internal government'.¹ 'A federal State', writes Dicey, 'is a political contrivance intended to reconcile national unity and power with the maintenance of State rights'.² More scientific and more precise is Monsieur Borel's definition:

'L'état fédératif est l'état dans lequel une certaine participation à l'exercice du pouvoir souverain est accordée à des collectivités inférieures, soit qu'on les adjoigne à l'organe souverain pour la formation de la volonté nationale, soit que, prises dans leur totalité, elles forment elles-mêmes cet organe souverain'.³

Sir Herbert Samuel's definition is as follows:

'A federal State is one in which there is a central authority that represents the whole, and acts on behalf of the whole in

¹ *History of the Constitution*, p. 131.

² *Etat Fédéral*, p. 1.

external affairs and in such internal affairs as are held to be of common interest, and in which there are also provincial authorities with powers of legislation and administration within the sphere allotted to them by the Constitution.' ¹

. At this point the question, already noted, again obtrudes itself. There is no doubt that, speaking generally, federalism has marked a stage, in some cases a transitory stage, on the road towards unification, not on that towards disintegration. Is this of the essence of federalism? Or is it accidental? Mr. Freeman answers the question without hesitation:

Is the tendency of Federalism centripetal?

'A Federal Union', he writes, 'to be of any value must arise by the establishment of a closer tie between elements which were before distinct, not by the division of members which have been hitherto more closely united. . . . No one could wish to cut up our United Kingdom into a Federation, to invest English Counties with the rights of American States, or even to restore Scotland and Ireland to the quasi-federal position which they held before their respective unions. . . . Federalism' is out of place if it attempts either to break asunder what is already more closely united, or to unite what is wholly incapable of union.' ²

It may, perhaps, be objected that Freeman's conclusion, stated with characteristic dogmatism, was the result of an over-hasty generalization from instances which in 1863 were less numerous than they are to-day. But a writer who has had the advantage of another half-century of experience reaches a similar conclusion:

'Federalism', he writes, 'is the coming together of a number of States formerly separated and sovereign into some kind of arrangement to secure the common safety and prosperity. These various independent or quasi-independent Governments agree to give up to the Federal Government a greater or less proportion of their independence. . . . It is a movement from disunion towards union, a change from the centrifugal principles of political action to the centripetal.' ³

¹ *Nineteenth Century*, No. 428, p. 676.

² *Federal Government*, pp. 72, 85.

³ *Federalism and Home Rule*, by 'Pacifcus' (P. S. Oliver) (1910).

Professor Henry Sidgwick, an authority not less entitled to respect, expresses a contrary view, he points to

'another way distinct from union of communities previously independent, in which in modern times federality has come to be developed namely by the establishment of secured local liberties, mainly under the influence of the sentiment of nationality, in States that were previously of the unitary type'¹

Condi-
tions of
Federal-
ism

These opinions and definitions are cited as the readiest means of indicating some of the outstanding characteristics of federal government, and also because they point to certain conditions essential to the success of a peculiarly delicate and difficult form of constitution. Among these conditions three stand out conspicuously. First, there must be a group of communities, so far united by blood, or creed, or language, by local contiguity or political tradition, as to desire union, but not so closely connected by all or any of these ties as to be satisfied with nothing short of unity. Nowhere is this condition more literally fulfilled than in the Swiss Confederation, though it is hardly less so in the modern German *Reich*. Secondly, none of the States should be individually so powerful as to be able single-handed to resist foreign encroachments, and maintain their own independence. This was, as we have already seen, the finally compelling motive which brought into federal union the Australian Colonies of the British Crown. So long as those colonies had the Southern Pacific to themselves attempts at union were repeatedly disappointed. The appearance of European neighbours induced a more accommodating spirit. A third condition is, that there should be no marked inequality among the several contracting States. This is a condition which in its entirety is virtually unattainable. But it is important, as John Stuart Mill points out, 'that there should not be any one State so much more powerful than the rest, as to be capable of vying in strength with many of them combined. If there be such a one, it will insist on being master of the

¹ *Development of European Polity*, p. 438

joint deliberations : if there be two they will be irresistible when they agree ; and whenever they differ everything will be decided by a struggle for ascendancy between the rivals.¹

To this defect Mill ascribed the failure of the German Bund (of 1815), and many publicists hold the opinion that the predominance of Prussia vitiates the federal principle in the modern German *Reich*. Bismarck unquestionably aimed rather at the Prussianization of Germany than at the creation of a true federal State. He did not succeed to the full extent of his ambition. Nevertheless, it remains true that Germany is on this account a less perfect type of the federal State than the United States of America or the Australian Commonwealth.

Federalism, then, must be regarded as a half-way house between entire independence and a compact and completely homogeneous national unity. Mazzini was not without fear lest his ideal of a united Italy should be frustrated by a federal compromise promoted by the diplomatists. 'Never rise in any other name than that of Italy, and of all Italy.' Such was the adjuration addressed to his disciples in the *Young Italy* Association. 'Federalism', he insisted, 'would cancel the great mission of Italy in the world.' *Young Italy*, therefore, must be steadfastly unitarian. The genius of Richelieu and Colbert overcame the disintegrating elements which down to the seventeenth century still threatened the unity of France. Richelieu's victory over the Huguenots and the great nobles, the commercial unification carried through by Colbert, gave to the last days of the old monarchy a delusive appearance of centralization. But not until the steam roller of the Revolution had passed over her surface, levelling all excrescences, constitutional, ecclesiastical, social, and economical, did France become really and effectively one. Not even in France, still less in Italy, least of all in Germany, has unification been an unmixed advantage, yet, politically, no one can doubt that to that side the balance

¹ *Representative Government*, p. 125 (Popular Edition).

heavily inclines Federalism, then, is essentially a compromise John Stuart Mill declared that 'where the conditions exist for the formation of efficient and durable federal unions the multiplication of them is always a benefit to the world' But Mill, as we have seen, regarded federalism solely as an integrating process, he was contrasting federal union not with unity but with separation and independence Mr Freeman, on the other hand, contrasting it on the one side with the small City-State of antiquity and, on the other, with the big unitary States which are characteristic of the modern world, found it to exhibit some of the advantages, but also some of the disadvantages, of both systems As compared with the City-State, Federalism is, he contended, less effective in promoting the political education of the individual citizen, but it is more effective as a factor in the maintenance of international peace and order Compared, on the other hand, with the big unitary Nation-State, it is better calculated to improve the political education of the citizen, but more apt to promote or to invite international hostilities

Federal-
ism and
Peace

Is this comparison a fair one or the inference sound? Is it true that Federalism is less favourable to the maintenance of international peace than unitarianism on the large scale Would Germany, for example, have been less menacing to European peace if the work of Bismarck had been carried to its logical conclusion, and the Hohenzollerns had established a unitary State? But this illustration is not perhaps at the moment felicitous Switzerland is a safer one Does federal Switzerland more seriously threaten the peace of Europe than Norway? But again the comparison is something less than satisfactory For Switzerland is in a peculiar international position Let us go farther afield Is federal Australia more likely to invite attack or to initiate hostilities than unitary South Africa? He would be a rash man who would answer these questions with a categorical affirmative

If then we are bidden to regard federalism as merely

a compromise, if it be dismissed as a half-way house, we may fairly retort that it is a compromise which is by no means devoid of compensating advantages as compared with the unitary City-State of the ancient world, and that it is not inherently inferior to the great Nation-State which, for some four hundred years, was the typical product of modern political development

For the better apprehension of the characteristic features of the genuine federal State it may be useful, in the next place, to notice certain types of constitutions which though not unitary still fall demonstrably short of true federalism. These 'composite' States are of various grades

Embry-
onic
Federal
Forms

Lowest in the scale of composite States is the Personal Union, a species of which the dual monarchy of the Hapsburgs was typical. After the defeat of Austria at the hands of Prussia at Königgratz (Sadowa), the Hapsburg Emperor, expelled by Bismarck from Germany and from Italy, was impelled, if his Empire was not to forfeit its high estate among the 'Powers', to come to terms with his Hungarian subjects. The Constitution of Hungary, dating in large part from immemorial antiquity, had been further defined by the *Golden Bull* of Andreas II in 1222, but from 1527 onwards a part of Hungary, and eventually the whole of that ancient kingdom, was attached to the Crown of Austria. Until the close of the seventeenth century the union of the Crowns was purely personal, but in 1687 the Emperor Leopold I induced his Hungarian subjects to abrogate certain portions of the *Golden Bull*, and in particular the clause which guaranteed the elective character of the Hungarian Crown. The Crown was henceforward to be hereditary in the House of Hapsburg. A further step was taken by the Emperor Charles VI, in the *Pragmatic Sanction* of 1713, whereby Hungary was declared inseparable from the Hapsburg dominions, so long as there should be a legal heir, while, on the other hand, the Hapsburg Sovereign swore to preserve the Hungarian

Personal
Union
the Haps-
burg Mon-
archy

Constitution intact, with all the rights, privileges, laws, and customs of the Kingdom. Threatened by the centralizing policy of Joseph II, Hungarian autonomy was saved by the tact of his successor, Leopold II, only, however, to be sacrificed to the reaction which followed on the abortive risings of 1848. The abolition of the Hungarian Constitution in 1848 was followed by ten years of repression, but in October 1860 the Emperor Francis Joseph issued the 'October Diploma' by which a species of federalism was introduced into the institutions of the Empire, all its 'provinces' (of which Hungary was one) being invited to send representatives to a federal diet in Vienna. Federalism, under a predominant partner, failed, however, to satisfy the autonomist aspirations of a people who for seven hundred years had been wont to elect their own King, and for eight hundred had enjoyed at least a semblance of constitutional government.

Consequently, after the Austrian defeat by Prussia in 1866, Francis Déak, the leader of the Hungarian autonomists, was summoned to Vienna, and the details of a Compromise (*Ausgleich*) were worked out between him and the Austrian Chancellor, Baron Beust. The Emperor Francis Joseph consented to be crowned apostolic King of Hungary in the cathedral of Buda Pesth, and the two kingdoms were placed on a basis of complete equality and, technically, of independence. Each kingdom was to have its own Legislature, its own Executive, and its own Judiciary, but, in addition, each Legislature was to appoint a Delegation of sixty members for common consultation on the affairs of the dual (but not joint) monarchy, and there were to be three joint ministries for Foreign Affairs, Finance, and War. After the Treaty of Berlin (1878) it was further agreed that Bosnia and the Herzegovina should be jointly administered as 'Common Imperial Territory'.

Had the Government of Austria-Hungary been genuinely parliamentary, the *Ausgleich* of 1867 might, through the 'Delegations', have developed into a closer form of union,

in fact into a species of Federalism, but the Emperor Francis Joseph being, to all intents and purposes, a personal ruler, the connexion between the Austrian Empire and the Hungarian Kingdom remained essentially personal. Consequently, on the fall of the Monarchy in Austria, the slender tie was snapped.

Even more purely personal were the relations of Sweden and Norway between 1815 and 1905. The tie which bound the two countries, as we have already noted, was merely that of allegiance to a common monarch. Consequently when, in 1905, Norway resolved to renounce allegiance to King Oscar, the Constitution of Norway as a 'free, independent, indivisible, and inalienable State' remained intact. Prince Carl of Denmark was substituted for King Oscar of Sweden as King of Norway, but the rupture of the personal tie involved no further change.

Precisely parallel were the relations between the Crowns of England and Scotland from 1603 to 1707. Had the Scottish *Act of Security*, passed in 1704, not been abrogated by the *Act of Union* in 1707, Scotland might, in a constitutional sense, have been severed from England in 1714, as easily as was Norway from Sweden in 1905. The King of England was King of Scotland, as the Emperor of Austria was also King of Hungary, but between the two countries there was not even so much semblance of community as is implied in the Austro-Hungarian Compromise of 1867. Similarly, after the repeal of the Declaratory Act of 6 George I and the partial repeal of Poyning's law in 1782, still more after the Renunciation Act of 1783, the only formal link between Great Britain and Ireland was that afforded by the fact that King George the Third was King of Great Britain and also King of Ireland. Had the King not recovered from his illness in 1789, and had the two Parliaments, as seemed at one time not unlikely, appointed different Regents, even this precarious link would have been snapped. The union between England and Hanover, which subsisted from 1714 to 1837, was merely personal, and was dissolved without friction by the

Sweden
and
Norway

England
and
Scotland,
Great
Britain
and
Ireland

6 George I

accession of a female sovereign to the English Crown in 1837 Personal union, then, is the least binding form of association between two or more sovereign States

Confeder-
(Sta-
bund)

Next to *Personal union* in the ascending scale is a *Confederation*, or *Staatenbund* This is a lower and less coherent form of a Federation, or *Bundesstaat*

' It is rather a conglomeration of States than a real State, as it wants the necessary organs for legislation, government, and jurisdiction It stands half-way between a permanent international alliance and a regularly constituted State, and is, therefore, an incomplete and transitional form In this form there may be a common people, but there is no real united nation It presents, at least externally, the appearance of one State, of an international personality, but yet is not organized into one central State distinct from the particular States ' ¹

It is this lack of federal or national organs, and the absence of a collective State, distinct from the sum of the constituent States, which distinguishes the looser *Staatenbund* from the more coherent *Bundesstaat* In the latter, as Bluntschli points out, both the collective State (*Gesammistaat*) and the particular States (*Einzelstaaten*) have an organization complete and distinct In a Federation, he says, ' there are not merely completely organized particular States, but there is an independently organized common or central State The power of the Federation is not left to one of the particular States, nor entrusted to the States in common It has produced its own Federal or National organs which belong only to the collective body ' ²

The Ger-
manic
Confede-
ration
1815-66

Here it is necessary to observe an important historical fact, viz that a *Staatenbund* frequently precedes, in the ordered process of constitutional evolution, the more highly developed *Bundesstaat* Germany, Switzerland, and the United States of America all afford notable examples of this truth The Germanic Confederation of 1815 was a typical *Staatenbund*, hopelessly ineffective for political

¹ Bluntschli, *Lehr vom modernen Staat* (Eng trans), pp 457, 252

² *Op cit*, p 252

and military purposes, potent only, when manipulated by the strong hands of Metternich, to arrest constitutional progress in the smaller States adhering to the Bund. Broken by the action of Prussia and the exclusion of Austria it gave place in 1867 to the more coherent but less extensive North German Confederation, as this in turn expanded and deepened, after the Franco-German war, into the Federal Empire of 1871. America, as we have seen, went through a similar experience. Called into being by military exigencies in 1778, but not finally ratified by all the constituent States until 1781, the Confederation proved anything but satisfactory, either for the purposes of the war, or, on the conclusion of peace, for civil government. Nothing less than sheer necessity drove the statesmen of the young Republics into the Federal Constitution of 1787. In the history of Switzerland the same process is observable. Its existing Constitution is by several degrees less completely federal than that of Germany or the United States, but it represents a marked advance upon the Constitution of 1848, still more upon the pact of 1815, and most of all upon the loose Confederation which subsisted between the thirteen cantons prior to the establishment of the Helvetic Republic, one and indivisible, in 1798.

The history of the United Provinces of the Netherlands was—up to a point—strikingly parallel with the history of Switzerland. Jealously guarding, one the source, the other the mouth of the greatest of Central European rivers, both originally integral parts of the Holy Roman Empire, both attaining to formal independence of the Empire by the Treaty of Westphalia (1648), alike in their sturdy championship of political liberty, alike in hardy frugality and in the economic prosperity which waits upon thrift, alike in the possession of wealthy cities, with their powerful burgher aristocracies, alike in the possession of a hardworking peasantry intent upon extracting the last ounce of nutriment from a not too kindly soil, alike in the pursuit of democratic ideals without the sacrifice of

The
United
Provinces
of the
Nether-
lands

practical utilities, alike engaged in a ceaseless conflict with great elemental forces, alike inured to hardship—in the one case by the snow-clad Alps, in the other by a storm-swept sea, alike in a strong sense of local patriotism, but compelled to accept, under the stress of political expediency, a certain measure of centralized authority—there is, indeed, a striking parallel between the fortunes of the two countries. Yet with all these points of resemblance Switzerland and the Low Countries present striking divergencies of political development. One of the most curious but characteristic features in the political history of Switzerland is the absence of great names. For a 'hero' of the Swiss nation we have to fall back on a more or less legendary Tell. We should not expect Switzerland to have produced a Bismarck or a Cavour, we might have looked for a George Washington or an Alexander Hamilton, but we should look in vain. The United Netherlands, on the other hand, is, in large measure, the creation of great men. William the Silent, Prince Maurice, Prince Frederick, Henry John Van Olden Barneveldt and John de Witt, William III and Heinsius. Again, whereas the Swiss Confederation was the product of many centuries of territorial expansion and accretion, slowly evolving from a mere perpetual alliance of three forest communities into a strong and compact federal State, the United Provinces were called into being under the stress of one insistent and momentous crisis. Switzerland, moreover, never for a moment wavered in her strict adherence not merely to the democratic, but to the republican ideal. The Netherlands were from the first divided in their allegiance to the republican and the monarchical principles. But from the standpoint of the present chapter it is the final result which is significant. Switzerland stands to-day for pure federalism—an agglomeration of sovereign States. In the Netherlands, on the contrary, the centripetal principle has achieved a notable victory, and, under the Constitutional Monarchy of to-day, provincial distinctions are tending to insignificance, if not to obliteration.

Nevertheless, any analysis of the composite forms of the State would be singularly incomplete without at least a passing reference to a formation which for two hundred years played so great a part in European, indeed in world history

With the circumstances under which the Union of the Netherlands came into being—the heroic struggle between the Low Countries and Philip II—we cannot concern ourselves. The constitutional evolution of the independent State begins with the Union of Delft (25 April 1576). By this agreement the two sea-board provinces of Holland and Zeeland bound themselves in an indissoluble union, they constituted William of Orange 'Sovereign ad interim', authorized him to treat with foreign powers for a 'Protectorate' and entrusted him with the supreme command in war, with the control of all money voted by the Estates, with the execution of the laws, and the exercise of patronage to the higher offices. On his part, he undertook to uphold the reformed religion and to suppress any worship contrary to the Gospel, though it was expressly and somewhat contradictorily ordained that no inquisition should be 'permitted into any man's faith or conscience, nor should any man be troubled, injured or hindered by reason hereof'.

The
Union of
Delft,
1576

But the union of the two sea-board provinces supplied only the protoplasm of the later organism, and if the process of evolution had not been hastened by the genius and enthusiasm of William of Orange, the organism might never have developed. The Prince issued a series of passionate appeals to the other Provinces to come into the embryonic union, and the firstfruits of his enthusiasm were reaped in the *Pacification of Ghent*, a compact concluded on 8 November 1576.¹ By this famous Treaty the whole seventeen Provinces of the Netherlands were for the moment brought into line, they swore eternal friendship and agreed to succour each other in all their under-

The Paci-
fication
of Ghent,
1576

¹ Harrison, *William the Silent*, pp. 160, 181, where many extracts from these eloquent appeals are quoted.

takings, it was agreed that the Spanish troops should be expelled from the Netherlands, that a States-General, representative of all the seventeen Provinces, should be called to take measures for their common government and defence, and for the maintenance of religion, and that there should be complete freedom of trade between the Provinces. The authority of the Spanish Sovereign was, however, scrupulously respected. Nothing was to be done to impinge upon his Sovereignty, though the Prince of Orange was to act permanently as his Majesty's Lieutenant Admiral and General, in the Provinces of Holland and Zeeland.

The *Pacification of Ghent* was in fact and form a compact between the Prince of Orange, together with the estates of Holland and Zeeland, on the one part, and the other fifteen Provinces upon the other, and it was ratified by the Union of Brussels in January 1577. It did not, however, correspond to the realities of the situation and it was destined, consequently, to a short life. It was, indeed, accepted by Don John of Austria, hardly less adroit in diplomacy than successful in the field, and on 17 February 1577 the *Perpetual Edict*, which confirmed the *Pacification*, was actually accepted and signed by Philip II himself. Seven months later (September 1577) the pacificator, William of Orange, made a triumphant State entry into Brussels, and the Union of the Seventeen Provinces, under the distant suzerainty of Philip of Spain, under the immediate leadership of William of Orange, seemed to have emerged from the land of dreams and to have taken bodily shape among political realities. But the truce was, in fact, hollow. And no man was more conscious of its unsubstantiality than its author. No man knew better the antagonism which persisted between the northern and southern Provinces, the jealousy of city against city, the hostility of the nobles against himself, the ecclesiastical strife between Catholic Flanders and Calvinistic Holland. Of these elements of weakness his adroit adversary, Don John of Austria, took full advantage, and by

a combination of diplomacy and force quickly sapped the foundations of the unsubstantial structure. By the opening months of 1578 the 'Pacification of Ghent' was at an end.

Don John died on 1 October 1578, but his task was carried on by his nephew, Alexander of Parma. In particular Alexander spared no effort to conciliate the Flemish nobles, already jealous of the Silent Prince, always suspicious of the bugbear aristocracies and increasingly alarmed by the spread of Calvinism. The fruit of Alexander's tactful diplomacy was quickly apparent.

The Provinces of Artois and Hainault and the cities of Lille, Douay, and Oichies detached themselves from the Union of Brussels, and on 6th January 1579 formed the separate Union of Arras, and later came to terms with Alexander of Parma.

The
Union of
Arras,
1579

William's counter-stroke followed within the month.

On 29 January 1579 there was published from the Town House of Utrecht the most famous document in the Constitutional history of the Netherlands.

The
Union of
Utrecht,
29 Janu-
ary, 1579

Drafted by William of Orange and his brother, John, Count of Nassau, the *Union of Utrecht* is the real starting-point in the history of the Confederation, which was subsequently known as the United Provinces. It forms, moreover, no unimportant epoch in the evolution of federal government. It demands on this account detailed consideration. Confined in the first instance to the five States of Holland, Zeeland, Utrecht, Gelderland, and Friesland, it was afterwards joined by Overijssel and Groningen, and, for a time, by the cities of Bruges, Antwerp, Ghent, and Ypres.

Under the terms of this Instrument the five federating Provinces bound themselves, 'as if they were one Province', for the mutual defence of their rights and liberties, 'with life, blood, and goods' against all foreign potentates, including the King of Spain. Each Province renounced the right to conclude separate treaties, but was to retain its own 'special and particular privileges, freedoms, exemptions, laws, statutes, laudable and ancient customs, usages, and all other rights whatsoever'. The Govern-

ment was to be vested in a General Assembly, composed of deputies from each provincial assembly, and there was to be an Executive Council responsible to the General Assembly. No Treaty, however, was to be concluded, no war to be begun, no peace concluded, and no common taxes levied, nor was the Constitution to be revised, nor new State admitted, except with the unanimous assent of the Provinces. Other matters of less importance were to be determined by a majority of votes taken in the manner then customary in the States General. In the event of disputes between one Province and another, the matter was to be referred to the Stadtholders then in office, if they failed to agree, they were to appoint arbitrators. The common revenue was to be raised from excise and import duties, and all the Provinces were to enjoy equality in trade conditions. As regards defence, the fortification of frontier towns was to be 'at the cost of the cities and Provinces wherein they are situated, but having assistance thereto as to half from the generality'. For any new fortresses the generality was to pay the whole cost. All citizens between the ages of 18 and 30 were to be enrolled and liable to service. For the admission of any neighbouring Province or City into the Confederacy the unanimous consent of the Provinces was required. Finally, in regard to religion, it was laid down that Holland and Zeeland were 'to comport themselves as best they think', the other Provinces were to conform to the terms of the *Pacification of Ghent*, or frame their own, but complete liberty of conscience was to be held inviolate.¹

Some pains must be taken to apprehend the precise significance of this historic document. It was not intended to constitute thereby an independent State, or an independent federal system. The sole immediate object was, as Motley insists, to provide for 'defence against a foreign oppressor'.

'The establishment of a Republic, which lasted two centuries, which threw a girdle of dependencies entirely round the

¹ Cf. Reich, *Select Documents*, pp. 593-615, for full text.

globe, and which attained so remarkable a height of commercial prosperity and political influence was the result of the Utrecht Union but it was not a premeditated result. A State, single toward the rest of the world, a unit in its external relations, while permitting internally a variety of sovereignties and institutions—in many respects the prototype of our own much more extensive and powerful nation—was destined to spring from the act thus signed by the envoys of five provinces. Those envoys were acting, however, under the pressure of extreme necessity for what was believed an evanescent purpose. The future confederacy was not to resemble the system of the German Empire, for it was to acknowledge no single head. It was to differ from the Achaian League in the far inferior amount of power which it permitted to its general assembly, and in the consequently greater proportion of sovereign attributes which were retained by the individual States. It was, on the other hand, to furnish a closer and more intimate bond than that of the Swiss Confederacy, which was only a union for defence and external purposes, of cantons otherwise independent. It was finally to differ from the American Federal Commonwealth in the great feature that it was to be merely a confederacy of Sovereignities, not a representative Republic. *Its foundation was a compact, not a Constitution.* The contracting parties were States and Corporations who considered themselves as representing small nationalities *de facto et de jure*, and as succeeding to the supreme power at the very instant in which allegiance to the Spanish monarch was renounced. The general assembly was a collection of diplomatic envoys bound by instructions from independent States. The voting was not by heads, but by States. The deputies were not representatives of the people, but of the States, for the people of the United States of the Netherlands never assembled—as did the people of the United States of America two centuries later—to lay down a Constitution by which they granted a generous amount of power to the union, while they reserved enough of sovereign attributes to secure that local self-government which is the life-blood of liberty.¹

The Constitution thus analysed by Motley was in truth one of the clumsiest, most complicated, and most unworkable Constitutions with which any people ever elected to

Defects of
the Union
of
Utrecht

¹ Motley, *Rise of the Dutch Republic*, iii. 415-26

burden themselves. Fundamentally, it was a loose confederation of five (afterwards seven) Sovereign States. But each Province was in turn a federation of municipal Councils, which entrusted the Government of the Province to the Provincial Estates and its Stadtholder. These Municipal Councils were oligarchical in the extreme, formed by co-optation within a contracted range of patrician burgher families. Such unity as existed was represented by the States-General and the Executive dependent upon it—the States' Council. But the States-General, like the Swiss Diet, consisted not of representatives, but of envoys who had to vote in accordance with instructions issued to them by their several Provincial Governments. Ordinances might be issued by the States-General, but they could be proclaimed and executed only by the Provincial Estates. Similarly in regard to taxation for common purposes. Requisitions were issued by the States-General to the Provincial Estates, whether any response was made to them depended not upon the former, but upon the latter, and the response, as may be supposed, was not invariably ready.¹

Apart from the inherent unwieldiness of the Constitution there were many difficulties to be overcome. Between the burgher aristocracies of the cities and the nobles and peasants of the country districts, there was little unity of sentiment and not much of interest. The cities, again, were jealous both of each other and of the authority of the Stadtholder. The latter was consequently disposed to look for support to the unenfranchised citizens in the towns and to the peasants. Opposed to both were the exclusive civic oligarchies in whom, as we have seen, municipal government was vested. The political antagonism was further intensified by ecclesiastical differences. The wealthy burghers tended towards the more liberal Theology associated with the 'heresy' of Arminius, the Stadtholder and the lower classes were rigid in their adherence to Calvinism.

¹ Cf. Blok, *People of the Netherlands* (Eng. trans.), vol. III, c. XIII, and *Loc. Cit.*, p. 72.

How, under these untoward circumstances, did the United Provinces manage to wrest their independence from Spain? How did the Confederation, when once the great crisis was over, manage to maintain even a semblance of unity?

Reasons
for suc-
cess of
the
United
Province

The answer to the first question is writ large in the glowing pages of Motley's famous epic and is familiar to every student of the European history of the seventeenth century. It is, therefore, unnecessary to do more than glance at the outstanding reasons. The first is to be found in the position of the great antagonist. Philip II of Spain was a vigilant and untiring enemy, but he was relatively remote from the scene of operations, and although he was, on the whole, faithfully and skilfully served, he had domestic difficulties to contend with, which, as Queen Elizabeth discovered, rendered him less formidable in practice than on paper. The general European situation was, moreover, strongly in favour of the Dutch. Queen Elizabeth, it is true, had a constitutional aversion both to Calvinists and to rebels, but she had enough detachment to form a shrewd estimate of the importance of the insurrection in the Netherlands to her own diplomatic game. She had no mind to be their Sovereign, and their ultimate success may have been more complete than she cared for, but she would, if necessary, have made real sacrifices to prevent them from being crushed by Philip. As it was, their interests were well served by English privateers, and at critical moments the Queen herself was willing to risk the enmity of her brother-in-law by timely seizure of Spanish treasure and Spanish ships. In regard to France, also, fortune was kind to the States. A union between the two great Catholic Powers would have seriously menaced the liberties both of England and the Netherlands. But political rivalries cut across religious sympathies. France had her own domestic complications to deal with, and even had there been no Huguenots to engage her attention, she would have been slow to aid Philip in removing a difficulty from his political path. Still, when all is said, European complications would have availed

little but for the sturdy and indomitable spirit of the Dutch patriots, the brilliant inspiration which led them to transfer the duel to the sea, and the splendid leadership of a great statesman and a great soldier, both vouchsafed to them, in the crisis of their fate, by the House of Orange 'Neither the sympathy of the Huguenots, nor the gold of Elizabeth, nor the marshes of Holland, nor the defeat of the Armada would have availed one jot to save the Confederation from ultimate ruin had it not been for the tenacity, the patriotism, and the self-sacrifice of the nation itself. Never since the days of Miltiades and Themistocles did a people better deserve their freedom than the patient Dutch under their silent prince' ¹ It is well and truly said.

In 1584 the 'Silent Prince' was struck down by the hand of the assassin, his work only half accomplished, the future of his country dark and uncertain, the Constitution evolved from its peculiar circumstances almost unworkable in its complexities and contradictions. 'Rarely', says Blok, 'has any State Government been so complicated as was that of the young Commonwealth in its early years of acknowledged independence' ² That the Constitution stood the strain at all was due to two or three circumstances unconnected with its formal terms, and apparently contradictory to its inherent genius. The first is the fact that among the seven Sovereign States one stood out predominant if not supreme. Holland was equal in wealth, reputation, importance, and population to all the other Provinces combined. It was with Holland, not with the United Provinces, that France and the Empire held diplomatic intercourse. Holland, alone of the States, was represented at the Courts of Paris and Vienna. Holland 'contained within its borders the great trading towns of Amsterdam, Rotterdam, Delft and Dordrecht, Leyden, the seat of the University, and the Hague, the centre of the Government' ³

¹ Wiekman, *Ascendancy of France*, p. 217

² *People of the Netherlands* (English trans.), III 377

³ Wiekman, *op cit*, p. 219

Holland, however, had its own constitutional complications. It was no more a political unit than the United Provinces themselves. Just as the latter formed a federation of Sovereign States, so Holland itself was a federation of Sovereign Municipalities. But here again salvation was found in an accidental pre-eminence. As the Provincial States of Holland could defy the States-General of the Netherlands, so the burgher aristocracy of Amsterdam could defy the Estates of Holland.

'The great city of Amsterdam, with its banks, its docks, and its thousands of fishermen and artisans, founded, it was said, on the carcasses of herrings, was the centre of the commerce and the opulence of Northern Europe. The Venice of the North, alike in her commercial prosperity and her close oligarchical Government, she so far dominated over her colleagues that in the days of her greatness the United Provinces were little less than Amsterdam writ large.'

The predominance of Amsterdam suggests another unifying factor in the conglomerate confederacy of the Netherlands. Reference has been made more than once to the oligarchical character of the municipal Governments. In the Dutch, as in the Swiss Confederation, the civic oligarchies had their good as well as their bad side. Socially and economically oppressive as the patrician families may have been, their political pre-eminence unquestionably supplied an element of unity in the midst of diversity.

Yet another element was supplied by the steady development of the quasi-monarchical power of the House of Orange. The office of Stadtholder was nominally a provincial one. The offices of captain-general and admiral-general were federal. Both were elective. But there was a persistently increasing tendency on the part of the Provinces to elect the same Stadtholder, while for eighty of the most critical years in the history of the Republic the supreme command of its military and naval forces was vested in the head of the same great family. The advantages thus secured cannot be over-estimated. The contrast, no less than the parallelism, between the history

The
House of
Orange

of federal Switzerland and that of the federal Netherlands, is now becoming more clearly apparent. On paper the centrifugal forces in the Low Countries were hardly less potent than among the Swiss Highlands. The Provinces of the former were not less tenacious of their sovereign rights than the Swiss cantons. In both, city-republics were politically predominant. In both, the central institutions were contemptible in their weakness, if the States-General seemed to exercise more of authority than the federal Diet it was due to accidental circumstances unconnected with the Constitution. But amid many points of resemblance there are three of contrast, and each is supremely significant. Neither Bern, Zurich, nor Lucerne could pretend to the predominance of Amsterdam, still less of the County of Holland, nor could Switzerland rely upon such hereditary services as those of the House of Orange, nor did the Helvetic Republic produce a succession of statesmen like Jan van Oldenbarnevelt, John de Witt, and the pensionary Heinsius. Switzerland was seemingly independent of individual genius, Holland, if not actually made, was tended in her cradle, nurtured in her youth, and governed in her manhood, by some of the greatest statesmen whom modern Europe has produced.

Later
history of
the
United
Provinces

Only a few words must be added to summarize the later stages in the constitutional evolution of the United Provinces. For more than a century and a half after the death of William of Orange (1584) two parties strove for, and periodically achieved, pre-eminence. On the one side was the Orange party, tending always to the unification of the Provinces, and relying for support mainly on elements of the population which would now be described as 'democratic'. On the other side were the bourgeois oligarchies in the larger cities, stern in their adherence to republicanism, mistrustful of the 'monarchical tendencies' of the House of Orange, and jealous of all encroachments, even in the cause of 'national' unity, upon municipal autonomy.

Meanwhile, the Dutch Republic took its place among the Sovereign States of Europe. The long struggle with Spain

was virtually ended by the truce of 1609, and though the United Provinces were involved in the Thirty Years' War, the Treaty of Westphalia brought to them, as to the Helvetic Republic, a formal acknowledgement of independence.

Internally, however, the country was distracted by the unending strife of the two parties mentioned above. From the death of William of Orange down to 1651 a succession of Orange princes retained a varying measure of authority, until in 1650 William II attempted, in the interests of unification, a *coup d'état*. The Stadtholder had hitherto been the servant of seven Sovereign States; the members of the States-General were merely delegates of the same sovereigns, between the States-General and Holland, which in wealth and importance equalled, if it did not exceed, the six other Provinces combined, there was constant friction, while the city of Amsterdam defied alike the States-General of the Netherlands and the Provincial Estates of Holland.

The new Stadtholder was supported by the army, the navy, and by all the Provinces save Holland, and in October 1650 greatly strengthened his position by a treaty with France. A fortnight afterwards, however, the Stadtholder was carried off by small-pox, and in 1651 Holland summoned a grand Assembly to revise the Constitution. The general effect of the revision is summarized by Dr Edmundson as 'the establishment of the hegemony of Holland in the Union, and the handing over of the control of its policy to the patrician oligarchies which formed the town-councils of Holland'.

Save for the predominant genius of John de Witt, Grand Pensionary of Holland, the new scheme would have proved entirely unworkable. For nearly twenty years (1653-72) John de Witt made himself supreme in Holland, and made Holland supreme in the Dutch Confederation. Louis XIV's attack on the Republic in 1672 brought De Witt's supremacy to an end, and the Orange Party came back to power in the person of William III, who was confirmed in the hereditary stadtholderate of five out of

*Coup
d'état* of
William
II, 1650

John de
Witt and
William
III

the seven Provinces De Witt was murdered in 1673, and for thirty years the ascendancy of William of Orange was undisputed. But on his death (1702) the male line of William the Silent became extinct, and the tide swayed once again in favour of the burgher oligarchy. From 1702 to 1720 Hensius, the Grand Pensionary of Holland, was practically ruler of the United Provinces, but in 1748 a collateral Prince of the House of Orange was appointed Stadtholder of all seven Provinces with the title of William IV, and shortly afterwards the position was declared hereditary.

Hereditary
Unitary Mon-
archy

Thus the Confederated Republic became to all intents and purposes an hereditary monarchy, and though violent oscillations continued in the fortunes of the House of Orange, the close of the Napoleonic wars witnessed their restoration and the formation of a kingdom of the Netherlands in which for the first time Belgium was incorporated. The union—an ill-assorted one—lasted only fifteen years, in 1830 Belgium reasserted its independence. By this time, however, the unification of the Dutch Provinces was wellnigh complete, the revisions of the Constitution in 1848 and 1887 were all in a unitary direction, and, save in the method by which the Upper Chamber of the Legislature is elected, the Constitution of the modern Kingdom of the Netherlands retains scarcely a trace of its federal origin.

The history of the United Provinces, thus briefly and barely summarized, possesses in relation to Federalism a unique significance. It affords the sole instance in which an exceptionally loose Confederation has issued in the formation not of a federal republic but of a unitarian monarchy. The Confederation was itself unique in character, exhibiting as a whole, or in its component parts, almost every variety of political association. But its special significance, in relation to the type of State under analysis in the present chapter, consists in the illustration it affords of what Federalism is not. The implications of genuine Federalism must engage attention in the next chapter.

XXXVIII FEDERALISM AND DEVOLUTION

'Where the conditions exist for the formation of efficient and durable Federal Unions, the multiplication of them is always a benefit to the world'—J S MILL

'Un régime fédéral plus ou moins étroit sera généralement adopté dans l'avenir parce que c'est le seul moyen d'assurer l'union des races et plus tard de l'espèce sans briser les diversités locales et sans asservir les hommes à une cloisonnante uniformité'—LAVITTE, *Le Gouvernement dans la démocratie*

'The federal system limits and restrains the sovereign power by dividing it, and by assigning to Government only certain defined rights. It is the only method of curbing not only the majority but the power of the whole people, and it affords the strongest basis for a second chamber, which has been found the essential security for freedom in every genuine democracy'—LORD ACTON

'When we turn our gaze from the past to the future an extension of federalism seems to me the most probable of the political prophecies relative to the form of Government'—HENRY SIDGWICK

THE preceding chapter should have made it plain that the lower forms of the composite State are not designed for permanence. Personal Unions are, from their nature, dependent upon factors which may or may not persist in successive generations. Of the Personal Unions surveyed in the previous chapter only one has issued in organic union, two have led to separation, the fourth was brought to an end by the Legislative Union between Great Britain and Ireland, a union which has itself proved to be transitional. The purely personal tie, which from 1714 to 1837 united Great Britain and Hanover, came to an end with the accession of a female sovereign to the English throne, a similar tie between the Kingdom of Denmark and the Duchy of Holstein, after persisting for many centuries, was sundered by the forcible intervention of Prussia.

Weak-
ness of
the
Personal
Union

Of the Confederations which have been subjected to analysis three proved to be half-way houses on the road

Of Con-
federal-
tions

from severalty to federal union ; the fourth issued in a unitarian monarchy. That a Confederation of States may fulfil a useful purpose is not denied . this particular form of political organization has proved its value both in the conduct of war and in the organization of peace, and not less in the protection and promotion of trade. Yet, as compared with a federal State, still more with a unitarian State, of equal magnitude and resources, its efficiency is impaired by characteristics which are not accidental but inherent. Never has the inherent weakness of a Confederation (*Staatenbund*) been more clearly exposed than by a philosophical statesman who had personal experience of the inconvenience and danger which this clumsy political contrivance involved. Alexander Hamilton wrote in *The Federalist* as follows :

‘ The great and radical vice in the construction of the existing Confederation is in the principle of legislation for States or Governments, in their corporate or collective capacities, and as contradistinguished from the individuals of which they consist. . . . Government implies the power of making laws. It is essential to the idea of a law that it be attended with a sanction ; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will in fact amount to nothing more than advice or recommendation. This penalty, whatever it may be, can only be inflicted in two ways : by the agency of the Courts and Ministers of Justice, or by military force ; by the coercion of the magistracy or by the coercion of arms. The first kind can evidently apply only to men ; the last kind must, of necessity, be employed against bodies politic, or communities, or States. . . . In an association where the general authority is confined to the collective bodies of the communities that compose it, every breach of the laws must involve a state of war ; and military execution must become the only instrument of civil obedience. Such a state of things can certainly not deserve the name of Government, nor would any prudent man choose to commit his happiness to it.’¹

The elements of weakness thus discerned by Hamilton

¹ *The Federalist*, No. xv.

in a Confederation of States were further exemplified in the notorious cases of the Germanic Bund of 1815, and in the Swiss Confederation nor have they, as we shall see, been entirely eliminated from the higher form of Federalism subsequently adopted in both those countries. Having then cleared the ground by an examination of certain types of bastard Federalism we may, the more confidently, proceed to analyse the distinctive characteristics of the true and perfect form of Federalism.

Charac-
teristic
features
of true
Federal-
ism

First, a Federal Constitution must be the result of a ✓ deliberate and conscious act of political construction. A Federation is made, not born. 'It cannot', as Dr Adams insists, 'grow up of itself out of an earlier different situation by a series of more or less unconscious changes, as the Constitution of England was formed, so that after a lapse of time the nation finds itself living under a federation whose adoption it can assign to no specific date nor to any deliberate act of choice'.¹ It follows, secondly, that the results of this conscious and deliberate act must be embodied in a written document or *Instrument*. A Federal Constitution partakes, as we have seen, of the nature of a treaty between Sovereign States, and it is evident that the terms of a treaty must be reduced to writing. Nor is it desirable that the terms should be varied save by the deliberate action of the parties to the pact. Hence, thirdly, a Federal Constitution must almost of necessity be rigid. There are, as we have seen, degrees of rigidity in Federal Constitutions: the Constitutions of the United States, Australia, and Switzerland are much more rigid than that of Germany, while that of the Dominion of Canada is embodied in a Statute which may (theoretically) be amended or repealed by the same process as that which applies to any other Statute of the Imperial Parliament. But, though the degree of rigidity may vary, no Federal Constitution can be exposed to such a full measure of flexibility as is possessed by the unitary Constitution of Great Britain.

¹ *Federal Government*, p. 84.

It follows from what has been said that in every Federal Constitution there must be, fourthly, some body, presumably judicial in character, entrusted with authority to safeguard the Constitutional Instrument and competent to interpret its terms. Fifthly, there must be a precise distribution of powers, on the one hand, between the several organs of the Federal Government—the Executive, the Legislature, and the Judiciary, and on the other as between the Federal Government and the Government of the component States.

The Vital
Question
in a
Federal
State

The manner in which powers are distributed as between the Central and the State Governments is, indeed, vital; it determines the whole character of the Federal State. As a fact, the solution of the problem has depended, in large measure, upon the circumstances under which the Federal State has come into being. The thirteen confederated republics which in 1788 agreed to form the federal union now known as the United States were intensely tenacious of their rights as Sovereign States and only agreed to delegate to the central authority certain specified functions. All powers not so specified remain vested in the component States.

The same principle was adopted in the case of the Australian Commonwealth, where a similar jealousy for the rights appertaining to independent existence long delayed the consummation of federal unity. Thus the *Commonwealth Act* enumerates (Part V, § 51) thirty-nine matters in regard to which the Federal Legislature is competent to legislate, but in a later section (§ 107) it expressly states 'Every power of the Parliament of a Colony which has become or becomes a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth, or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.'

The *British North America Act* of 1867, on the contrary, enumerates sixteen subjects as being exclusively vested

in the Provincial Legislatures, and twenty-nine subjects as belonging to the jurisdiction of the Dominion Parliament. It is, however, expressly stated (§ 91) that the enumeration of the powers of the Dominion Parliament is 'for greater certainty', but not so as to restrict the right of that Parliament to deal with any matter 'not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces'.

So vitally important, indeed, is this question as to the distribution of powers, and in particular the residuality of powers, that the Judicial Committee of the Privy Council went so far as to deny to the Dominion of Canada the true federal quality, on the ground that the federating Colonies failed to preserve their original constitution and status. The words of the judgement, delivered by the Lord Chancellor (Lord Haldane), are remarkable

Judge-
ment of
Privy
Council
Judicial
Commit-
tee, 17
Decem-
ber, 1913

'In a loose sense the word 'federal' may be used as it is there [i.e. in the British North America Act, 1867] used, to describe any arrangement under which self-contained states agree to delegate their powers to a common government with a view to entirely new constitutions even of the states themselves. But the natural and literal interpretation of the word confines its application to cases in which these states, while agreeing on a measure of delegation, yet in the main continue to preserve their original constitution. Now, as regards Canada, the second of the resolutions passed at Quebec in October, 1864, on which the British North America Act was founded, shows that what was in the minds of those who agreed on the resolutions was a general government charged with matters of common interest and new and merely local governments for the provinces. The provinces were to have fresh and much restricted constitutions, their governments being entirely remodelled. This plan was carried out by the imperial statute of 1867. By the ninety-first section a general power was given to the new parliament of Canada to make laws for the peace, order and good government of Canada without restriction to specific subjects and excepting only the subjects specifically and exclusively assigned to the provincial legislatures by section 92. The Act therefore departs widely from the true federal model adopted by the constitution of the

United States, the tenth amendment to which declares that the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively or to their people' ¹

Sir John Bourne, with all the authority attaching to the Clerk of the House of Commons of Canada, maintained a contrary opinion

'The weight of authority now clearly rests with those who have always contended that in entering into the federal compact the provinces never intended to renounce their distinct and separate existence as provinces when they became part of the confederation. This separate existence was expressly reserved for all that concerns their internal government. Far from the federal authority having created the provincial powers, it is from these provincial powers that there has arisen the federal government to which the provinces ceded a portion of their rights, property and revenues' ²

With all deference to the Judicial Committee of the Privy Council I cannot but agree with a distinguished publicist that the judgement of 17th December 1913 savours of legal pedantry, and betrays a failure to distinguish between two types of a Federal State, each equally entitled to be regarded as orthodox, though one of them may be described as centripetal, the other as centrifugal ³. Nevertheless, the judgement does illustrate the immense significance attached, by the highest legal authority in the British Empire, and indeed by every jurist of repute, to the allocation of the residual powers, and it may frankly be conceded that of two orthodox forms of Federalism the more perfect is represented by the Constitutions of the Commonwealth of Australia and of the United States, the less perfect by that of Canada.

Precisely the same point was raised in the discussions in the British Parliament on the abortive Bill for the

Government of
Ireland
Bill, 1920

¹ *Attorney-General of the Commonwealth of Australia & Ors v Colonial Sugar Refining Co., Ltd., & Ors* (*The Times*, 18th Dec 1913)

² *Federal Government in Canada*, p. 124, published in *Johns Hopkins University Studies in Historical and Political Science*, 7th Series, Baltimore, 1889

³ T. G. Bowles, *ap. Candid Review*, pp. 217, 218

Government of Ireland (1920) The Bill, as drafted, reserved to the Imperial Parliament certain enumerated powers, and conferred upon the Parliaments of Southern and Northern Ireland power to make laws on all subjects not so enumerated. An amendment was moved to reverse the process, and to confer upon the two Parliaments which the Bill proposed to set up in Ireland power to deal with certain subjects, fourteen in number, enumerated in the amendment. The amendment, though resisted by the Government and ultimately rejected by the House, was framed upon the Canadian analogy—professedly the model on which the Bill itself was founded—and was supported on the constitutional ground that it was of the essence of the federal principle that the residue of powers should vest in the originating authority, while only enumerated powers should be exercised by the delegated authorities. In the case of Australia and the United States the separate Colonies or States supplied the originating authority, and the residue of powers was, consequently, vested, and properly vested, in them. In those cases the process was, as we have seen, centripetal. States, formerly independent, were brought together into a federal unity. In the case of the Dominion the process was mainly, though not wholly, centrifugal: certain powers were conferred by the Imperial Parliament upon the Canadian Provinces. The Government of Ireland Act professed to do the same thing; but it was untrue to its professions. Since the Act has proved, as regards Southern Ireland, abortive, the point may be regarded as academic, but the discussion, during the passage of the Bill, was, in relation to the problem of Federalism, not the less significant.¹

Further points of great importance remain, however, to be considered. Whether the process of division of powers be by reservation or enumeration, whether the residue of powers be vested in the Federal Government or in the

Dualism
of Law

¹ Cf. *Official Report (Commons)*, vol. 129, pp. 1509 *seq.* An amendment in similar terms was subsequently moved in the House of Lords (*Official Report (Lords)*, vol. 42, p. 869).

component States, there must necessarily result a dualism of law, and there ought to be a complete reduplication of political organs

Perhaps the most obtrusive differentia between a unitary and a federal State is the unity or duality of the legal system. An English citizen owes obedience only to one body of law, a citizen of Prussia or Bavaria or Pennsylvania owes obedience to two. In fact, in the United States there are four competing kinds of laws: the federal Constitutional law, the ordinary federal law, the law of the State Constitution, and the State law. In a unitary State, such as England, there is but one. In France, it is true, the citizen is, in certain relations, subject to 'administrative' law as well as ordinary law. But the essential point is that all citizens of France are subject to the same laws whether they belong to Brittany or Languedoc, whether they dwell in Paris or Bordeaux. In a federal State it is otherwise. The citizen of Virginia and the citizen of New Hampshire owe common obedience to the federal law of the American Union, but the State law of Virginia, to which the Virginian is also subject, may and does differ widely from that of Maine. Similarly in Germany. To federal statutes Saxon and Hessian owe obedience in common, but in addition each must know and obey the laws of his own State. The citizen of a unitary State like England knows nothing of any such complication and possible conflict.

The
Federal
Govern-
ment and
the com-
ponent
States

In this connexion Mr. Dicey¹ raised a point of great importance to the working of federal institutions, viz. how far the Federal Government can control the legislation of the component States? We have already seen that in the United States, as well as in Australia and Canada, the competence of the Federal Legislature is limited by the Constitution, of which the Judiciary is the guardian and interpreter. It is otherwise in Switzerland, where the Courts must treat federal (though not cantonal) legislation as valid, and where no question as to the competence of the

¹ In the last (1915) edition of *The Law of the Constitution*, Appendix

Federal Legislature can, therefore, be raised. Frequent recourse to the *Referendum* must, however, be held to place Switzerland, as regards federal legislation, in a class apart.

The point now under discussion is a separate though a cognate one. Neither in the United States nor in Switzerland is the Federal Government competent to annul or disallow ordinary State legislation, though in the United States the Federal Constitution guarantees the maintenance of the republican form of government in every State. In Switzerland, the Cantonal Constitutions and any amendments thereto require the assent of the Federal Government, nor will the Federal Government recognize any article in a Cantonal Constitution which is repugnant to the Federal Constitution. In Canada, on the contrary, the Dominion Government can disallow any Act passed by a Provincial Legislature. In Germany there would seem to be (though the point is not free from ambiguity) no such power vested in the Government of the *Reich*.

The complication, inherent in Federal Constitutions, and arising from the dualism of laws and the reduplication of legislative organs, extends also to the spheres of the Judiciary and the Executive.

The position of the Judiciary is from the point of view of Federalism of supreme significance. In this respect the United States presents perhaps the most perfect federal type. There we find a complete system of federal judiciary existing throughout the Union side by side with and quite independent of the State Courts. So completely self-contained are the two systems that no appeal can lie from the State to the federal Courts. Canada goes, in this matter, to the opposite extreme. It is one of several marks of the distinctly unitarian bias of the Canadian Constitution that there is no reduplication of Courts. Canada has only one set of Courts and one staff of Judges—the latter being appointed by the Dominion Government. Australia stands midway between Canada and the United States.

The
Judiciary

Less unitary and more federal than the former, the Commonwealth is more unitary and less federal than the latter. This point has already received attention, here it may suffice to say that the High Court of Australia is the supreme federal Court, that the State Courts are invested with federal jurisdiction, and that an appeal does lie from the State Courts to the High Court of Australia.

The
German
Reich

In this respect the position in the German Reich is peculiar, and perhaps to some extent transitional. The *Reichsgericht* remains the Supreme Court for ordinary cases, but, as already indicated, the *Staatsgerichtshof* was set up in 1921 to try impeachments against the President and Ministers, and in particular to determine questions arising out of the interpretation of the Constitution, and all conflicts between the Federal Government and the States, and between one State and another. To this extent the German Judiciary is centralized, but, on the other hand, the ordinary administration of justice is still vested not in the National Government but in that of the States, though the *Staatsgerichtshof* is charged with the duty of deciding disputes between the National Government and those of the States in regard to the administration of national laws by the States.¹

In Switzerland, as we have seen, there is a National Tribunal to which in certain cases an appeal lies from the Cantonal Courts, though, generally speaking, the administration of justice is cantonal. Thus among the examples cited, Canada approaches, in regard to the Judiciary, most nearly to the unitarian model, in Switzerland justice is most completely decentralized. In the United States a perfect equipoise between the two principles is attained.

The Exe-
cutive

A similar difference in the intensity of the federal principle may be observed, also, in the Executive sphere of Government. In administrative matters, as in judicial organization, Switzerland exhibits her characteristic

¹ *Const. of Württemberg*, Art. 15, and cf. Laurence Lowell, *Greek European Governments*, ch. x.

centrifugal tendency. Except in regard to foreign and military affairs, to customs, railways, posts, telephones and telegraphs, and one or two other matters, the Federal Council has no staff of administrative servants and exercises no direct or immediate executive authority. This is one of the features of the existing Swiss Constitution which recalls the earlier stage of a Confederation. Ordinary federal laws are executed, and the judgements of the Federal Courts are carried out, by the cantonal authorities, though the latter act, in a general sense, under the supervision if not the control of the Federal Council. The United States is, in this as in other respects, consistently federal, possessing a complete hierarchy of federal officials who function, each in the appropriate sphere, side by side with the official hierarchy of the component States.

Germany represents a compromise between the cantonal bias of the Swiss Constitution and the federal genius embodied in American institutions. In the sphere of legislation the German *Reich* tends to the unitary principle much more decidedly than the United States; but the execution of the law is entrusted, to a far larger extent than in America, to the States or *Länder*.

While, however, there are degrees of federal intensity even in Constitutions of unexceptionable federal orthodoxy, we must nevertheless conclude that a reduplication of organs, legislative, administrative, and judicial, is one of the indispensable marks of true Federalism.

To another question it is hardly possible to give an equally positive answer. Is Bicameralism an essential feature of a truly Federal Constitution? It is at least highly significant that there is, in fact, no Federal Constitution in existence which does not provide for a Second Chamber or Senate. Moreover, such Second Chambers have, as a rule, been deliberately constituted in such a way as to embody and emphasize the federal principle. A genuine Federation (*Bundesstaat*) as opposed to a Confederation (*Staatenbund*) represents not only a union of States

Bicameralism
and
Federalism

but a union of citizens. It is, therefore, entirely appropriate that while one of the two Chambers of the Legislature should represent the aggregate of citizens, the other should represent the union of States. That principle is carried out, as we have seen, to its farthest logical conclusion in the Senates of the United States, of Australia, and of Switzerland. So fully, indeed, that in the Senates of those countries the component States enjoy equal representation, irrespective of their size, population, or wealth. The Senate of the Canadian Dominion and the German Reichsrat are also based upon the idea of the representation of States, but the principle is less logically and more timidly applied. The question, however, remains whether a Federal Senate is essential to the successful working of federal institutions.

With the example of the Senate of the United States before him, and confronted by the fact that no attempt has yet been made to work a Federal Constitution on a unicameral basis, the comparative jurist is under a strong temptation to answer this question in the affirmative. This at least may be affirmed with confidence: that no device has yet occurred to the wit of man so well adapted as Bicameralism to fulfil the essential purpose of emphasizing the union of States, as distinguished from the union of peoples. Should it, hereafter, be found possible to dispense with a second Chamber in a Federal Constitution, the possibility will be due either to the weakening of the federal principle and the encroachment of the unitary principle in that particular country, or to the invention of some device, not yet disclosed, better adapted than a Senate to the preservation of the distinctive character of Federal Government.

Cabinet
Government
and
Federal
ism

An even more disputable question claims brief notice. Is there any reason to apprehend that the Cabinet form of Executive is inconsistent with the smooth working of a Federal Constitution? In those British Dominions which have adopted the federal principle the attempt has been made to engraft it on to the Cabinet principle as

evolved in England, and by England bequeathed to her self-governing Colonies. In the United States, on the other hand, the Executive is Presidential, not Parliamentary; in Switzerland it cannot be classed in either category. In Germany the transition from Presidential to Parliamentary Government is so recent as to afford very insufficient ground on which to base a conclusion. Federalism is, indeed, itself so recent a device, in relation to the history of Political Institutions, that any generalization connected with its machinery must be stated with the utmost caution. This much, however, is plain: that of the three most perfect examples of Federal Constitutions as yet devised, only one has attempted to combine the Cabinet principle with that of Federalism: and the strength of inherited English traditions may, in that case, account for the attempt. Whether, in the case of Switzerland and America, the omission is accidental or essential, it is not possible to say. Time alone, therefore, can supply an answer to a question which may well prove, in the near or distant future, to be of more than academic interest.

This chapter must not close, though the transition is somewhat abrupt, without a passing reference to another aspect of the problem of Federalism.

Federal-
ism and
Devolu-
tion

During the first two decades of the present century 'Federalism' was strongly recommended by physicians of different schools as an anodyne for the many ills from which the British Constitution was believed to be suffering. The prescription took two, if not more, forms: on the one hand, it was proposed to bring into a federal union the various self-governing Dominions of the British Crown, including the United Kingdom or its component parts; on the other hand, it was suggested that the domestic maladies of the United Kingdom could be cured only by the adoption of the principle of 'devolution', and the setting up of subordinate legislatures in Scotland and Ireland, and possibly also in Wales and England. The

proposals varied almost infinitely in detail, but, broadly, they may be distinguished as centripetal or centrifugal, one section of federalists looked primarily to a federalization of the Empire, the other to a federalization of the United Kingdom. Some there were who combined both propositions.

Of Imperial Federation, of the transient popularity of the idea, and of its gradual weakening in face of the growth of self-conscious nationalism in the Oversea Dominions, something has been said in an earlier chapter of this book. Something remains to be said of the other aspect of British Federalism—the movement which may more properly be described as ‘Devolution’.

Conges-
tion of
Parlia-
mentary
business

The Imperial Parliament—so the argument ran—was hopelessly overworked. Its time was largely occupied by the discussion of matters which are of merely parochial or, at the best, of provincial importance. Reference has been already made to the fact that, of the total legislative output of the Imperial Parliament, only a relatively small proportion is applicable uniformly to the several parts of the United Kingdom. In the years 1901–10 only 252 out of the 458 Public Acts applied to the United Kingdom as a whole. Why not, then, recognize facts, and devolve upon subordinate legislative bodies the duty of legislating on matters of purely provincial importance? That there are sufficient matters of Imperial moment, or of matters common to the whole United Kingdom, to occupy the whole time and attention of the Imperial Parliament, is a proposition hardly disputable, and it is urged, with much force, that so long as no clear line is drawn between Imperial and domestic affairs there is perpetual danger lest a nominally Imperial Parliament may be elected on issues which are, in fact, purely parochial. That this danger is fanciful no one conversant with English politics during the last half-century can possibly pretend. Whether a more appropriate solution of the difficulty might not be found in the creation of a truly Imperial Parliament is a question which must, for the moment, be regarded as

outside the sphere of practical politics, but it may not always remain so

It would, however, be sheer affectation to ignore the fact that even devolutionary Federalism would hardly have come within the sphere of practical politics save for the insistent pressure of the Irish Question

Federal-
ism and
Ireland

For many years past an influential group of publicists¹ had been preaching the doctrine that 'Federal' Home Rule was the only solution of the Irish problem consistent both with the Imperialist sentiment of the English and the Nationalist aspirations of the Irish. Towards the end of the War, this group was confronted by the fact that a Home Rule Act, by no means federal in character, was on the Statute Book, and that on the legal termination of the War it would become operative. The leaders of the group redoubled their activities and formulated a definite scheme of 'Home Rule all round' on a federal basis. It was of the essence of that scheme that the Parliament of the United Kingdom should stand in the same relation to all the component Provinces.

'It must not', as Mr F S Oliver said, 'be the Union Parliament as regards England, Wales, Scotland, and Ireland, and at the same time in addition the National Legislature of England, Wales, and Scotland. The domestic affairs of England, Wales, and Scotland must come right out and be given into the charge of some other body or bodies. It would not be a true federation if the Parliament of the Union stood in a different relation to Ireland, on the one hand, and to England, Wales, and Scotland, on the other.'²

In other words, the principle of dualism of law, as described above, was to be rigorously applied, and the reduplication of organs, legislative, administrative, and judicial, was to be complete. That unquestionably was sound federal doctrine but the argument did not prevail.

Devolu-
tion Con-
fession: c

Meanwhile the problem was attacked on parallel lines from another side. On the 4th June 1919 the following

¹ e.g. the late Thomas Albutt, second Lord Brassey, William, Second Earl of Selborne, and Mr F S Oliver.

² F S Oliver, *The Possibilities of a Federal Settlement* (1918).

Resolution was agreed to by the House of Commons by a majority of 137 to 34

' That, with a view to enabling the Imperial Parliament to devote more attention to the general interests of the United Kingdom and, in collaboration with the other Governments of the Empire, to matters of common Imperial concern, this House is of opinion that the time has come for the creation of subordinate Legislatures within the United Kingdom, and that to this end the Government, without prejudice to any proposals it may have to make with regard to Ireland, should forthwith appoint a Parliamentary body to consider and report—

- (1) upon a measure of Federal Devolution applicable to England, Scotland, and Ireland, defined in its general outlines by existing differences in law and administration between the three countries,
- (2) upon the extent to which these differences are applicable to Welsh conditions and requirements, and
- (3) upon the financial aspects and requirements of the measure'

A 'Conference' of thirty-two members was accordingly set up under the chairmanship of Mr Speaker Lowther, to consider and report upon a scheme of Legislative and Administrative Devolution within the United Kingdom, having regard to (1) The need of reserving to the Imperial Parliament the exclusive consideration of (a) Foreign and Imperial affairs, and (b) subjects affecting the United Kingdom as a whole (2) The allocation of financial powers as between the Imperial Parliament and the subordinate legislatures, special consideration being given to the need of providing for the effective administration of the allocated powers (3) The special needs and characteristics of the component portions of the United Kingdom in which subordinate legislatures are set up

The Conference proved abortive¹ No reconciliation was found possible between those members of the Conference who were inspired by the idea of Scottish and

¹ *Letter from Mr Speaker to the Prime Minister* (Cmd 692 of 1920)

Welsh nationalism and those who looked primarily to the relief of the congestion of the Imperial Parliament. Nor did the Conference attempt to deal with Ireland. The Coalition Government had decided, in the autumn of 1919, to bring forward a scheme for the government of Ireland on lines which, in effect, knocked the bottom out of any scheme for 'Devolution'. Treatment, simultaneous and identical, for each component part of the United Kingdom was, as we have seen, the vital condition laid down by the advocates of a 'Federal Solution'. The Home Rule Bill of 1920 dissipated all hopes of such a solution and, at the same time, brought down the ambitious edifice of a federal scheme for the whole of the United Kingdom.

The truth is that, specious as was the proposal of Federal Home Rule, it never had any serious chance of acceptance. The Irish Separatist would, of course, have none of it, nor could it be expected to satisfy the nationalist who demanded 'Dominion Status' for Ireland. The southern Nationalist liked Federalism very little better than Unionism, Ulster (though preferring it to Home Rule) liked it much less. From the moment the Government produced the Bill of 1920, 'devolution' as regards Ireland was dead. Except as a solution of the historic problem of Ireland the idea of 'devolution' had never possessed any real vitality. It was killed by the fourth edition of 'Home Rule'.

The Government of Ireland Act (1920) was not genuinely federal in texture. The only trace of federalism was the continued representation of the two Irelands in the Imperial Parliament. For the rest, the Act provided for the setting up at Dublin and Belfast respectively of two Parliaments, with Executives responsible thereto, and each Parliament was to contribute twenty members to an all-Ireland Council, which was intended to form the nucleus, when the differences of North and South were finally appeased, of an all-Ireland Parliament. The Act, save in so far as it repealed the Home Rule Act of 1914, never operated in Southern Ireland, the Nationalists

Government of
Ireland
Act, 1920

bitterly resented the idea of partition, the Separatists would accept nothing short of an Irish republic

Northern Ireland—the six counties of Ulster—accepted the scheme as at least preferable to subordination to a Dublin Parliament, and have worked it with success. Southern Ireland adopted the principle of non-co-operation, refused to work the Act of 1920 and carried on a guerrilla war against the forces of the Crown. In July 1921, however, a truce was proclaimed, and, after much haggling, a 'treaty' was signed between the British Government and the leaders of the Southern Irish rebellion. On 31 March 1922 an Act embodying the terms of the Treaty received the Royal assent. Ireland was to enjoy Dominion status under the style of the Irish Free State, and to form, under the British Crown, a member of the British Commonwealth of Nations. The six counties of Ulster retained the right, which they promptly exercised, to contract out of the Irish Free State, and to retain the status conferred by the Act of 1920.

Irish Free
State Act,
1922

The principle of Federalism has, therefore, been in no wise advanced by the concession of Home Rule to Ireland. The Act of Union (1800) has been virtually repealed, a new 'Dominion' has, under unprecedented circumstances, been recognized, but no advance has been made on the path towards Federalism in the Empire, or towards Devolution in Great Britain. In a masterly analysis, published shortly before the Irish Bill of 1914 reached the Statute Book, Mr F S Oliver showed that Mr Asquith's Bill, whatever its intention, was not in fact federal, and he defined the position of federalists thus:

'What we mean when we say that the Home Rule Bill should be federal in tendency is that, whatever its *form*, its *effect* should be to grant to Ireland powers of local government, substantially similar to those exercised by local assemblies in Canada, Australia, and South Africa, while reserving to the Westminster Parliament powers not substantially less than those reserved to the Central Government of those three great self-governing Dominions' ¹

¹ *What Federalism is* (1914)

It may be thought that Mr. Oliver somewhat confused the issue by the inclusion of South Africa, the Constitution of which is not federal but unitary. Nor is the status of a Canadian 'Province' precisely parallel with that of a 'State' of the Australian Commonwealth. But his meaning was nevertheless unmistakable. The new Irish Parliament was to stand to the Parliament at Westminster not in the relation of the Australian, Canadian, or South African Parliaments to the Imperial Parliament, but in that of one of the State Legislatures in the United States to the Congress at Washington. But he rightly argued that such was not the status assigned to the Dublin Parliament by the Act of 1914 ; nor was it the status acquired in 1922.

Constitutional jurists may well deplore the fact that in 1922 an opportunity was missed for the trial of an interesting political experiment ; politicians may justly retort that the opportunity was not within their grasp.

This work is, however, concerned not with political possibilities, but with the actual machinery of government. The Anglo-Saxon race has made three important contributions to the experimental philosophy of Federalism. Two have been made under the aegis of the English Monarchy. There was plainly room for a fourth ; and some publicists were hopeful that the success of the fourth might pave the way for a fifth—which if achieved would be by far the greatest and most interesting as yet attempted in the world. But the time is not yet ; and the student of Comparative Politics must possess his soul in patience.

BOOK VIII

EPILOGUE

PARTIES AND PRINCIPLES

XXXIX PARLIAMENTARY GOVERNMENT AND THE PARTY SYSTEM

The Evolution of English Parties Party Organizations

'The Cabinet System presupposes a party system, and more than that, a two-party system'—SIR COURTENAY ILBELL

'Without parties no effective scheme of self-government could be devised in recent English parliamentary affairs, party organization has always been taken for granted, and the assumption of its existence has been transferred to the systems of all parliamentary nations. The rise of parties, political and yet national, marks the coming of age of the [English] people'—DR JOSEPH REDDICK

'Of such a nature are connexions in politics essentially necessary to the full performance of our public duty accidentally liable to degenerate into faction. Party is a body of men united for promoting by their joint endeavours the national interest upon some particular principle in which they are all agreed'—EDMUND BURKE

'Who born for the universe narrowed his mind
And to party gave up what was meant for mankind'

GOLDSMITH (on Burke)

'Party discipline is a means to a great end, but in some emergencies and under some leaders it may be made to frustrate the end at which it aims. It is the great end on which all are in common bent which contributes all that is noble or even innocent to party warfare. The one ennobling element, the palliation, if not the atonement for all shortcomings, is that all members of a party are enlisted in common to serve one unselfish cause, and that it is in that service that their zeal, even when least scrupulous, is working. Take this great end away and parties become nothing but joint-stock companies for the attainment and preservation of place'—ROBERT MARQUIS OF SALISBURY (1867)

A BOOK devoted to an analysis of the machinery of government cannot, if it pretend to any sort of completeness, close without some reference to the history and organization of political parties. Party organizations are, of course, entirely unofficial, they work in the twilight, their offices have none of the imposing magnificence of the great Public Departments, yet their contribution to the business of government is, under the system of representa-

The Place
of Party
in Politics

tive democracy—perhaps under any form of democracy—not only important but indispensable. From the chairman of the party, the chief organizer or agent, and the central executive, down to the constituency agent and the ward committee, the party organization has its appropriate part to play in the working of modern democracy, and is, therefore, entitled to separate analysis. It cannot, however, be denied that there has been a persistent disposition to look askance upon this particular cog in the machinery of democracy. Thus Bolingbroke, one of the least consistent of party politicians and one of the most fretful of political philosophers, lamented our ‘national divisions’

‘No grief hath lain more heavily at the hearts of all good men than those about the spirit of party, which inspires animosity and breeds rancour, which hath so often destroyed our inward peace, weakened our national strength, and sullied our glory abroad. It is time, therefore, that all who desire to be esteemed good men should join their efforts to heal our national divisions, and to change the narrow spirit of party into a diffusive spirit of public benevolence.’¹

It is consoling, however, to those who believe in party government to remember that, behind all this eloquent elaboration of the commonplace, lay a simple human desire to get Walpole and the Whigs out, and to let Lord Bolingbroke in. Yet when Goldsmith declared that Burke ‘to party gave up what was meant for mankind’ he coined an epigram which certainly crystallized a common sentiment, if it did not perpetuate a vulgar error.

Party government has always offered an easy target for the shafts of light-thinking and careless critics. Why should the nation be deprived, by an arbitrary line of division of the services, at any given moment, of at least fifty per cent of its efficient administrators? Why should even the lowliest of politicians dedicate to the service of party such modest talents as he may possess? Those who thus argue may be invited to reflect on the coincidence, frequently noticed, between the disintegration of parties and

¹ *Dissertation on Parties*, Letter I.

- the alleged decadence of the parliamentary principle Whether it may not be more than coincidence, whether the phenomena may not be logically related as cause and effect, are questions which will demand consideration in the course of this chapter But this much is certain the parliamentary system, nay the whole principle of representative democracy, has fallen on days which are difficult, if not actually critical The rapid development in the means of communication, the marvellous organization for the supply of information, if not of intelligence, the extension of the parliamentary franchise, and the diffusion of education, the increasing subordination of politics to economics, the substitution of vocation for locality as the bases of association,—all these have, as already indicated in preceding chapters, tended towards the weakening of the representative principle and the substitution of methods appropriate to a more direct form of democracy The Press, the platform, the trade union, and the caucus have unquestionably done something to decentralize political activity and to transfer discussion from Westminster to the constituencies, be they local or vocational Simultaneously with the operation of these and similar tendencies, there has been delivered a determined assault upon the theory and practice of party government Nor are the reasons unintelligible Party allegiance, if carried to excess, may easily obscure the claims of patriotism Concentration upon the business of vote-catching may tempt party leaders and party managers to ignore or to postpone the higher call of country Plainly, this is a weakness incidental to, if not inseparable from, party government, and it is one whose insidious growth must ever be closely watched and guarded against by patriotic statesmen The momentous question is, whether the predisposition to this malady is sufficiently serious to invalidate the claim which is preferred on behalf of the party system, and to justify the attempt to eradicate a growth which may become so malignant as to poison the whole body-politic

A brief historical retrospect may help towards an answer to a question, at all times of speculative interest, and to-day of special and insistent significance

The
Central
Problem
of Parlia-
mentary
Govern-
ment

The revolution of 1688 in effect transferred sovereignty from the Crown to Parliament, or more strictly to the King in Parliament, but Parliament as then organized found itself unequal to the discharge of its new responsibilities. Pass laws and impose taxes it could, but how was it to carry on or to supervise the day-to-day work of administration? John Pym, with the insight of real statesmanship, had half a century earlier pointed the way to a solution of the problem. Let the King choose as counsellors and ministers those whom Parliament may have cause to 'confide in'. There only lay the way of escape from the dilemma which had confronted the Stuart kings and their parliaments. But Parliament, though eager to play a more important part in public affairs, was obviously in doubt as to the precise part it was to play, and as to the actual means by which it was to assert the new authority it claimed. The tactlessness of James and the vagaries of Buckingham led Parliament to reassert the doctrine of ministerial responsibility, and from that doctrine to advance to the principle that the Legislature should control the Executive.

Party
Organi-
zation
essential
to the
working
of Repre-
sentative
Demo-
cracy

How should that control be exercised? The solution of the problem was, as we have shown, found in the evolution of the Cabinet. A small committee, composed of members of the Legislature, agreed on certain principles of government and on the main lines of policy, willing to accept collective responsibility for the administrative acts of colleagues, united in subordination to a common leader, at once servants of the King and answerable to Parliament—herein was discovered a device for reconciling the historic position of an hereditary monarchy with the advancing claims of a Legislature, in part elected, but largely nominated by a territorial oligarchy. But the new mechanism did not work easily until the Legislature had organized itself on party lines. Very slowly was it

perceived that more or less organized parties were essential to the smooth and efficient working of parliamentary government. Representative democracy as first elaborated in England rests upon a dual foundation ; a Legislature which shall represent and be responsive to the wishes of the electorate ; and an Executive responsible to the Legislature. This twofold responsibility presupposes organization alike in the constituencies and in the representative assembly. On what lines is such organization to proceed ?

' Idem sentire de republica was with them (" the best patriots in the greatest commonwealths ") a principal ground of friendship and attachment ; nor do I know any other capable of forming firmer, dearer, more pleasing, more honourable, and more virtuous habits. . . . Party is a body of men united for promoting by their joint endeavours the national interest upon some particular principle in which they are all agreed. For my part, I find it impossible to conceive that any one believes in his own politics, or thinks them to be of any right who refuses to adopt the means of having them reduced into practice. It is the business of the speculative philosopher to mark the proper ends of government. It is the business of the politician, who is the philosopher in action, to find out proper means to those ends, and to employ them with effect. Therefore, every honourable connexion will avow it is their first purpose to pursue every just method to put the men who hold their opinions into such a condition as may enable them to carry their common plans into execution, with all the power and authority of the State. As this power is attached to certain situations, it is their duty to contend for these situations . . . men thinking freely will, in particular instances, think differently. But still as the greater part of the measures which arise in the course of public business are related to, or dependent on, some great leading principles in government, a man must be peculiarly unfortunate in the choice of his political company if he does not agree with them nine times out of ten. . . . Thus the disagreement will naturally be rare ; it will be only enough to indulge freedom without violating concord or disturbing arrangement. And this is all that ever was required for a character of the greatest uniformity and steadiness in

connexion How men can proceed without any connexion at all, is to me incomprehensible'

In this classical passage Burke has for all time presented the apology for party government Originally indited with a view to the contemporary situation, shrewdly thrusting at the weaknesses of conspicuous individuals, and relentlessly analysing the distempers from which in 1770 the body politic seemed to be suffering, the *Thoughts on the Causes of the Present Discontents* contains reflections, profound in their sagacity, and of enduring value But this reference to Burke anticipates the sequence of the argument

The
Origin of
English
Parties

Various precise dates have been assigned to the rise of the historic parties which, under one designation or another, have, for nearly three centuries, confronted each other in England Hallam traced the origin of Whigs and Tories to the struggle over the Exclusion Bill in 1679 A more recent writer discovers the rise of parties in the ecclesiastical divisions which manifested themselves in Parliament after the passing of the Act of Uniformity under Elizabeth 'The formation of sects consequent on this division,' he writes, 'by uniting in groups the adherents of the various religious persuasions, created the first political and parliamentary parties in England'¹ In truth, the real genesis of the party system is to be found in the prolonged and acrimonious debates of the first sessions of the Long Parliament It was then that the two historic parties first began to define their position Roundheads and Cavaliers were the predecessors in title of Whigs and Tories, of Liberals and Conservatives The Whig party descends generically from the Puritans who, in 1640, ranged themselves under the leadership of Pym and Hampden against the 'Court' and the Laudian Bishops, the *fons et origo* of modern Toryism may be discovered in the party, consisting for the most part of devoted adherents of the Anglican Establishment, who were reluctantly compelled, by the increasing violence of the Puritans, and the 'Root and Branch'

¹ Redlich, *Parliamentary Procedure*, 1 33-4

attack upon Episcopacy, to espouse the cause of the Stuart monarchy. The first 'party' division in the modern sense was taken on the *Grand Remonstrance* (22-3 November 1641). Pym carried his Remonstrance by 159 votes to 148, and Falkland, who led the opposition to it, was in consequence unwillingly obliged to accept the full responsibility for his action on that critical occasion, by taking office as Secretary of State and the virtual head of a 'Royalist' Ministry. In those debates, in that division and its consequences, the party system originated.¹

After the Restoration parties began to define themselves more and more distinctly, and the adoption, about 1679, of the labels 'Whig' and 'Tory' clinched the matter. The actual names were as senseless and irrelevant as nicknames commonly are, but thenceforward, as Sir W. S. Gilbert taught, every Englishman born into the world was the destined occupant of one of two camps; he was either a little Liberal or a little Conservative.

Whigs
and
Tories

Meanwhile, Philosophy came to the aid of party politics. Hobbes, in *The Leviathan* (1651), so manipulated the doctrine of the 'Social Contract' as to make it serve as the basis of that principle of the Royal Prerogative which lay at the root of the Stuart theory of Government. The Tories of the Restoration period imbibed the doctrine, and found in it an apology for the dogma of 'Non-Resistance'. John Locke, similarly saturated with the principles of the 'Social Contract', gave to those principles, in his *Treatises on Civil Government* (1691), a new interpretation, which supplied for the Whig theory of limited monarchy a sufficient philosophical apology. 'King James II having endeavoured to subvert the Constitution of the Kingdom by breaking the original contract between King and People . . . the throne is thereby vacant.' So ran the famous resolution passed by the House of Commons on 28 January 1689. It re-echoed the doctrine preached by Locke, and the

Hobbes
and
Locke

¹ S. R. Gardiner prefers the division of the 8th of February 1641 upon the question of the abolition of Episcopacy (*Hist. of England*, ix 281). There is not much between us; but my date is more strictly political.

Treatises of Locke consequently became the political Bible of the eighteenth-century Whigs—the champions of the 'glorious' Revolution of 1688, and the vigilant guardians of the settlement based thereon

Parliament, the Public, and the Press

Paradoxically, however, the years immediately succeeding the triumph of 1688 exhibited Parliament, and particularly the House of Commons, at its worst. Emancipated from the control of the Crown, it had not yet become conscious of its responsibility to the electorate. Unorganized, petulant, and overbearing, Parliament, as Lord Macaulay observed, then began to exhibit some of the worst symptoms of irresponsible autocracy. Conscious of power, it manifested a curious incapacity to exercise it. Anxious to maintain a continuous control over the Executive, it knew not how it was to be done. The evolution of the Cabinet, and the gradual definition of the party system, eventually provided the instruments for lack of which Parliament could not at first make full use of the victory it had won.

In the meantime, despite its victory over the Executive, the Legislature found itself threatened by a serious rival. Notwithstanding the inequalities, the irregularities, and the anomalies of the system of representation, public opinion was becoming a potent political force. Of the new force thus manifested legislators and ministers were alike compelled to take account. But how was the populace to be reached, much less rationally influenced? The pamphleteer stepped into the breach. Queen Anne's reign was the heyday of the political pamphlet. The heroics of the Puritan Revolution had found natural expression in the epic of Milton, the reaction of the Restoration in the satire of Dryden. The ever-widening electorate of the nineteenth century obtained political nourishment from daily and weekly journalism. The incipient parties of the eighteenth century looked for inspiration—and not in vain—to the pamphleteers: the Whigs to Defoe, Steele and Addison, the Tories to Swift and Atterbury, to Arbuthnot, Prior, and Bolingbroke.

For once a passing fashion secured for us a permanent endowment. The transitory interests of the party leaders of Queen Anne's reign for all time enriched English literature. Swift's greatest work was not, of course, done to the order of political patrons, nor was Addison's, but Swift's *Conduct of the Allies* has been described, not unjustly, as 'the most effective party pamphlet of the century'. It certainly did more to commend to the country the Treaty of Utrecht than all the brilliant oratory of Bolingbroke.

Yet in the evolution of English politics, and the gradual establishment of the party system, the significance of Bolingbroke's tempestuous and tragic career is second to none. Endowed with almost every gift essential to success in the parliamentary arena—keen of intellect, eloquent alike with pen and tongue; with a mind richly stored, and with an immense capacity for work—his career nevertheless affords a warning rather than an example.

'Lord, what a world it is and how does fortune banter us' Fortune did indeed banter Bolingbroke. Deprived, by the sudden death of Queen Anne, of place and power, he took up his pen, and the *Letter to Sir William Wyndham* (1717), *The Dissertation upon Parties* (1733), and *The Patriot King* (1749) (to mention only those works which are pertinent to the present argument) attest his ingenuity and his industry.

Philosophical in form, these works are in fact elaborate party pamphlets. They were all written with an immediate object—to vindicate Bolingbroke's political position, to regain for him power if not place, and to provide the Tory party with a policy and a programme. A brief experience of service under the Old Pretender had sufficed to convince Bolingbroke that it was not to St. Germain that the Tory party must look for the means of restoration to power, and that their only hope lay in a frank repudiation of the Stuart cause and of the doctrine of Divine right, upon which philosophically that cause rested. The *Letter to Sir William Wyndham*, written in 1717 but not published until after the author's death, was an elaborate

attempt to vindicate his own conduct in relation to his party, and his party's policy in relation to the country. National in its composition and wholly patriotic in its aims, the Tory party had (so Bolingbroke argued) succeeded in bringing to a close a war which, while enriching the Whig merchants, was impoverishing the country and was no longer calculated to serve national interests. He frankly admitted that the Peace of Utrecht, for the conclusion of which he was primarily responsible, was 'less answerable to the success of the war than it might and it ought to have been'. Still it was preferable to the continuation of a purposeless war. Besides, the succession question was imminent and it was essential that in the crisis which might ensue the hands of the Government should not be tied by the preoccupation of a continental war. In plain English, Bolingbroke wanted to be free to make terms either with Herrenhausen or St. Germain, as party interests might dictate. But he was too late, the Queen's death was too sudden, the Whigs reaped the reward of preparation and promptitude, and the Tories were forced by the partisanship of King George to put their money on the Pretender. The fiasco of 1715, inevitable in view of the circumstances disclosed by Bolingbroke, ought, he argued, to cure the Tories of any further leanings towards Jacobitism. The sole hope for the future of the Party lay in final repudiation of the doctrine of Divine right and in frank acceptance of the 'revolution settlement' and the Hanoverian dynasty.

Whig
Ascen-
dancy,
1715-60

The Tory Party was, however, slow to accept the cynical but sensible advice of Bolingbroke. For nearly half a century the Whigs were in power. Led by the great 'revolution families', dominated by the territorial aristocracy, the Whig Party had also attached to itself the bulk of the new 'moneyed' interest, the Latitudinarian Churchmen, and all the Nonconformists. Throughout the reigns of the first two Hanoverian kings their ascendancy was unshaken. But Bolingbroke's untiring pen was gradually undermining their position. Walpole might

withstand the attacks of *The Craftsman*, nor was he shaken in his seat by the *Dissertation on Parties*—a political tract under the thin disguise of an historical treatise, but *The Patriot King*, despite the superficiality of its philosophy, was profoundly influential in restoring the morale of the party which Bolingbroke had espoused.

'For some years it formed the manual of a large body of enthusiasts. From its pages George III derived the articles of his political creed. On its precepts Burke modelled his conduct. It called into being the faction known as the King's Friends. It undoubtedly contributed to bring about that great revolution which transformed the Toryism of Filmer and Rochester into the Toryism of Johnson and Pitt.'¹

This passage contains a sound estimate of Bolingbroke's essential service to his party. As a political leader he was a failure. 'Three years of eager, unwise power, and thirty-five of sickly longing and unpotent regret—such or something like it, will ever be in this cold, modern world, the fate of an Alcibiades.' That is Walter Bagehot's caustic summary of this singular career, and if we have regard only to immediate and practical achievement it cannot be regarded as unfair. Yet it is poles asunder from the deliberate estimate of the most brilliant of Bolingbroke's successors in the leadership of the Tory Party.

'He eradicated from Toryism all the absurd and odious doctrines which Toryism had adventitiously adopted, clearly developed its essential and permanent character, discarded *jure divino*, demolished passive obedience, threw to the winds the doctrine of non-resistance, placed the abolition of James and the accession of George on their right bases, and in the complete reorganization of the public mind, laid the foundation for the future accession of the Tory party to power and to that popular and triumphant career which must ever await the policy of an administration inspired by the spirit of our free and ancient institutions.'²

In this characteristic passage the young Disraeli paid just tribute to the influence of his predecessor.

¹ C. Collins, *Bolingbroke and Voltaire*, c. III.

² *Vindication of the English Constitution*, p. 188.

Disraeli
and Bol-
ingbroke

Wherein lay the affinity between these two eminent 'schoolmasters of the Tory Party'? It is not far to seek. Compare the following passages

'The State is become, under ancient and known forms, a new and undefinable monster, composed of a King without monarchical splendour, a Senate of Nobles without aristocratical independence, and a Senate of Commons without democratical freedom'

So wrote Bolingbroke in *The Dissertation on Parties*. Disraeli, in reference to the middle period of the eighteenth century, wrote

'It could no longer be concealed that, by virtue of a plausible phrase, power had been transferred from the Crown to a Parliament, the members of which were appointed by an extremely limited and exclusive class, who owned no responsibility to the country, who debated and voted in secret, and who were regularly paid by the small knot of great families that by this machinery had secured the permanent possession of the King's Treasury. Whiggism was putrescent in the nostrils of the nation'¹

To Disraeli as to Bolingbroke the 'Venetian oligarchy' was anathema. In 1688 the Whigs had usurped the power of the State, their ascendancy was confirmed by the *coup d'état* of 1714, and thenceforward for a good half-century they resisted all assaults upon the citadel of Whiggism. The breach effected in 1770 was due partly to the disintegration in the work of the Whig party—to their break-up into family groups, to the corruption which had indeed become 'putrescent', partly to the persistence of George III, determined to reassert the authority of the Crown, partly to the detachment of the elder Pitt, partly to the growing influence of the unrepresented classes, but not least to the untiring literary activity by which, deprived of other means, Bolingbroke had endeavoured to reanimate the spirit of his party, and to provide them with a practical programme and a political ideal. Those efforts at last fructified, when, in 1770, Lord

¹ *Sybil*, c. III

North came into power and inaugurated a half-century of virtually continuous Tory ascendancy

That half-century (1770-1832) covered one of the most momentous periods of English history the loss of the American colonies, the dissolution of the first Empire, the foundation of a second, in Ireland, the trial and failure of the Grattan Parliament, the rebellion, the union, and catholic emancipation, the prolonged struggle with revolutionary and Napoleonic France, the slow but sure recovery after the devastations of war, the passing of the old agricultural England, the emergence of a new industrial England, finally, and from the standpoint of this chapter not least significant, the clear definition of the party system and the firm establishment of parliamentary government In 1770 the parliamentary system was still in the balance, by 1832 the scales had quite definitely tilted, and the principle of representative democracy was firmly established

To this consummation Walpole had contributed much, Pitt the younger had contributed even more The pivot of parliamentary, as opposed to presidential democracy, is a Premier From Pitt's day onwards England has been governed by a series of first ministers But if Pitt left an imperishable mark on the development of English Constitutionalism in its practical, administrative aspect, it was Burke who provided for all time the philosophical apology upon which that singular form of government fundamentally rests Of all commentators upon the English Constitution Burke is incomparably the greatest He penetrates farthest into the recesses of its peculiar genius, and with unfaltering sagacity and insight reveals the spirit which animates the working of its institutions If reverence be the essence of Conservatism, Burke was the greatest Conservative that ever lived He is even more than that, he is the central figure in the evolution of the party system Pre-eminent as the apologist of party government, Burke was at once a Whig of the Whigs, and of all Conservatives the most rational and philosophical

Edmund
Burke

That he was an infallible guide to the solution of contemporary problems it would be rash and indeed untrue to affirm on many of the subjects which gave occasion to his speeches he was inadequately informed, but he never touched a question without enriching the discussion by reflections of permanent value

Illustrations will readily suggest themselves even from the writings more strictly relevant to the subject in hand. Take the *Thoughts on the Causes of the Present Discontents*, or the *Appeal from the New to the Old Whigs*, or the *Letter to the Sheriff of Bristol*. In the first, Burke may have exaggerated the significance of the symptoms which he diagnosed yet he pierced to the heart of the political situation he perceived that the distemper of the time arose from the fact that the House of Commons, internally disorganized, was out of touch even with the electorate it was supposed to represent, and still more with the growing force of public opinion, which had been the support and strength of the elder Pitt in his prime

Burke shrank characteristically from the appropriate remedy—an extension of the franchise and a redistribution of seats—although he accurately diagnosed the seat of the disease. The remedy he preferred was administrative and economic reform, together with a reorganization of parties and a revival of party government

‘When, through the medium of this just connexion with their constituents, the genuine dignity of the House of Commons is restored, it will begin to think of its old office of control. It will not suffer that last of evils to predominate in the country, men without popular confidence, public opinion, natural connexion or mutual trust, invested with all the powers of government’

The ‘fundamentals’ of the historic constitution he would not touch

‘Never will I cut it in pieces and put it into the cauldron of any magician, in order to boil it with the puddle of their compounds into youth and vigour, on the contrary, I will drive

away such pretenders, I will nurse its venerable age and with lenient arts extend a parent's breath'

That is the authentic voice of Burke genuine in his liberalism, passionate in his conservatism But for the greater part of the nineteenth century the dominant voice in English politics was not Edmund Burke's, but Jeremy Bentham's Bentham it was who inspired the philosophical Radicalism which, in combination with the personal survival of Whiggism, gave to the new Liberal Party a half-century of political ascendancy For the new Liberalism *laissez faire* provided a compact and convenient formula, and from the passing of the first Reform Bill in 1832 to the passing of the third in 1884-5 the continuity of Liberal rule was hardly interrupted save by Peel's ministry (1841-6) and Disraeli's (1874-80) The truth is that the differences of principle between the two historic parties lessened during this period almost to the vanishing point Peel, though he collected around him a gifted group, did not reconstitute a shattered party Disraeli emphatically did, and he reconstituted it on the basis of the philosophy of Burke To him, as to Burke, the utilitarian philosophy of the State was anathema 'in order to make their politics practical, they are obliged to make their metaphysics impossible' 'If government is not divine,' he said in 1868, 'it is nothing It is a mere affair of the police office, of the tax-gatherers, of the guard-room'

Bentham
and
Modern
Liberal-
ism

The choice of a political party is no doubt largely temperamental, but the temperament depends upon adherence, largely unconscious, to a particular theory of the State and the relation of the individual thereto Political institutions are the outward and visible signs of an inward philosophy of government The English people have in the course of centuries evolved a form of government, unknown to the ancient world, and in the modern world peculiar to themselves That Constitution has, during the last one hundred years, been extensively copied—in some cases with disastrous disregard for the presuppositions

which alone rendered its success possible in the country of origin Parliamentary Government is of all forms of Constitution the most delicate in its adjustments and, therefore, the most easily thrown out of gear Depending, for the most part, upon conventions, perpetually adapting itself to new conditions, social and political, subject to continuous modification in detail, it demands from those responsible for its working unceasing vigilance, a clear apprehension alike of practical conditions and of philosophical implications, above all it demands a reverence, almost religious in character, for the inner spirit which has inspired and still informs it

Among the practical conditions essential to the working of Parliamentary Government not the least important is efficient Party organization In the home of Parliamentary Government that truth is consciously or unconsciously realized Consequently, in England the supremacy of the Party system, though not unchallenged, has remained unbroken

Third
Parties
the Irish
Separatists

Its operation has, however, been complicated during the last forty years by the rise of a third Party, or rather of two 'Third' Parties in succession From 1885 to 1914 the Irish Nationalists, led by Parnell, formed a compact body of some eighty members The Unionists were from 1886 to 1905, and the Radicals from 1906 to 1910, sufficiently numerous to ignore them, but when the two historic parties were more evenly balanced—as in 1885 and 1892-5—the Irish Party exercised a considerable, and from 1910-14 a dominating, influence upon the parliamentary situation

The
Labour
Socialists

In 1906 a new potent appeared on the stage of Westminster A group of twenty-nine members, elected under the auspices of the Labour Representation Committee, were returned to Parliament at the General Election of that year The formation of the new group was the outcome of a Conference (February 1900) on the question of direct labour representation, called by the Parliamentary Committee of the Trade Union Congress, and attended by

representatives of the Independent Labour Party, the Fabian Society, and the Social Democratic Federation, as well as by trade union delegates. The first-named society had been formed at Bradford in 1893, largely through the efforts of Mr. Keir Hardie, the Secretary of the Lanarkshire Miners Union, who in 1892 was returned to the House of Commons, as an avowed Socialist, for West Ham. The Joint Conference of 1900 resolved 'to establish a distinct labour group in Parliament, who shall have their own whips, and agree upon their own policy, which must embrace a readiness to co-operate with any party which for the time being may be engaged in promoting legislation in the direct interest of labour.'

This new Party descends intellectually from Karl Marx and Henry George, and it has in consequence declared war alike upon the Radical capitalist and the Tory landlord. From Marx and his doctrine of 'surplus value' the hand-worker learnt to believe that under a system of 'wage slavery' he was perpetually exploited by that 'unconscious thief' the owner of capital, from George's *Progress and Poverty* the landless man learned that there could be no amelioration in the lot of the poor so long as the institution of private property in land cumbered the earth and impeded the progress of society. The progress of the party which demands the socialization of all the instruments of production, distribution, and exchange has been astonishingly rapid. Its electoral progress can be most clearly indicated by the following table, which refers only to the 602 constituencies in England, Wales, and Scotland

Progress
of the
Socialist
Party

General Election	Seats Contested	Members Returned	Labour Vote
1900	15	3	62,698
	50	29	323,195
10 Jan			5,690
10 Dec			170,802
1918			144,945
			4,236,733
			4,348,379
			5,487,620

In 1900-1 the Party claimed a membership of only

375,932 persons, and of these only a very small proportion supported it at the polls. By 1920 it had reached a membership of 4,359,807—the highest figure yet touched. By 1924 it had fallen to 3,194,399—reflecting very closely the rise and fall in Trade Union membership—the Trade Unions having thus far supplied nearly nine-tenths of the Labour Party membership¹.

After the General Election of 1918 the Labour Party, numbering 57 members as against 33 non-Coalition Liberals, claimed to occupy the front Opposition Bench, and then leaders did in fact share it with the Liberals. In 1922 the Socialists almost doubled their vote in the country, as compared with 1918, and having contested no fewer than 414 seats, returned to the House 142 strong. In the election of 1923 they further increased their representation to 191. The Liberals, impelled towards union by Mr. Baldwin's programme of Protection, numbered 159, and combined with the Socialists to defeat the Conservative Government, which could count only on 258 supporters. As a result of the hostile, though composite, majority opposed to him, Mr. Baldwin resigned, and the Socialists formed an administration under the premiership of Mr. Ramsay MacDonald. But, dependent on Liberal sufferance, their tenure of office was precarious, and when, in the early autumn of 1924, the Liberal support was withdrawn, Mr. MacDonald's Government was defeated and he appealed to the country. The electorate, tired alike of coalitions and of minority government, returned a solid phalanx of about 420 Conservatives. The Socialist representation, despite the fact that more seats than ever were challenged, was reduced from 191 to 151. The Liberals fared even worse—they lost over 100 seats and appeared in the new Parliament an attenuated and disunited group of only 40 members.

It would seem then that in Parliament things are once more tending towards the historic two-party system, with only this difference—that the Socialists have displaced

¹ 3,158,002 out of the total enumerated above

the Liberals—whether permanently or not only the future can tell—as ‘His Majesty’s Opposition’¹

Such an Opposition, always providing the nucleus of an alternative Government, is the natural corollary of the evolution of Party Government. Its existence corresponds, moreover, to a deeply rooted instinct in the intellectual and social equipment of the English people. The national love of games emphasizes the idea of rivalry between opposing teams. The same spirit has long since manifested itself in politics. The Red Rose and the White were symbols of opposing policies even more than of hostile dynasties. Cavalier and Roundhead, Jacobite and Hanoverian, were the natural ancestors of Tory and Whig, Conservative and Liberal.

Between the latter parties differences were not, however, fundamental. They might differ as to the expediency of a particular policy, but down to 1867 the parliamentary contests were fought out between men who, though labelled respectively Tories and Whigs, all belonged to the same social class, had been educated in the same schools and universities, had been fellow officers in the same regiments—in fine, represented broadly the same general outlook upon life. The appearance first of a strong party of Irish Separatists, and, later, of a still stronger party of British Socialists, has brought about a transformation in the political scene. Between Conservative and Socialist the difference is not a difference in methods of administration—it goes down to the roots of social life and economic organization. They differ, in Cromwell’s phrase, not on ‘Circumstantials’, but on ‘Fundamentals’—on principles which affect the ultimate construction of society.

Cromwell held that agreement on ‘Fundamentals’ was essential to the success of parliamentary government. The lack of such agreement brought disaster to his own experiments in that difficult art. Whether fundamental differences will once again result in the breakdown of

¹ The coining of this phrase is commonly attributed to John Cam Hobhouse, and is dated about 1830.

parliamentary government, or whether, as is more likely, some basis of reconciliation is evolved between creeds which, in terms at least, are diametrically opposed, time alone will show. In the United States of America the economic problem has been, to a large extent, solved by the diffusion of capital among the wage-earners. Diffusion has gone much farther even in England than is commonly suspected. A clearer apprehension of basic economic principles may be expected to follow on a widening of practical experience of proprietorship. But, be these things as they may, the party system will disappear only with the decadence of parliamentary government. Of such decadence there are indeed symptoms already in countries where the essentials of party government have never yet been adequately appreciated. In England, on the contrary, the portents, despite what has been said above, are distinctly favourable. Even a brief taste of official responsibility has wrought a marked change in the attitude of the Socialist Party towards representative institutions. The principles of Syndicalism and of Direct Action still have their apostles, and should those principles obtain wide acceptance parliamentary government would obviously be doomed, but the signs of the times, so far as it is possible to discern them, do not point in that direction.

Extra-
Parlia-
mentary
Party
Organiza-
tion

The organization of political parties now extends far beyond the walls of Westminster. If the development of parliamentary government has carried with it the corollary of party organization in Parliament, the extension of the suffrage has necessitated similar organization in the constituencies. The term 'Caucus'—if not the thing itself—was, however, an importation from a country which, though frankly democratic, has never adopted the parliamentary type of democracy. Party organization was from the earliest days of the Republic far more elaborate in the United States than it has ever been, until quite recently, in England. Wheels within wheels have given

impetus to the 'machine' which, in turn, has dominated political life in that country. But the history and organization of American parties must not be permitted to detain us. For their detailed operations reference must be made to the great monograph of Ostrogorski,¹ and for a general view of the importance of party organization in America to the classical works of Bryce.

Until after the passing of the first Reform Act (1832) there was little extra-parliamentary organization in English politics. The borough constituencies contained few electors, they well knew the market value of a vote, and, where they were free to vote as they chose, almost invariably obtained it. Generally speaking, as we have seen, the boroughs were the property of great territorialists or Indian Nabobs. The forty-shilling freeholders in the counties were more independent, but the aggregate number of electors was so small as to render elaborate organization superfluous.

Recent
develop-
ment

Matters changed after 1832, and more rapidly after 1867. Both parties began, after 1832, to form local associations to assist in the registration of voters and the conduct of elections. In 1861 the Liberal Party started a central organization known as the 'Liberal Registration Association', and in 1867 the Conservatives established the 'National Union of Conservative and Constitutional Associations', in close alliance with the Party Whips and their central Conservative office. This has continued to be the central governing body of the latter party down to the present time, though to meet the changing facts of the electoral situation its machinery has been completely democratized.

Party organization, outside Parliament in the modern sense, really dates from the success of the Liberal Association organized, on a completely representative basis, at Birmingham, in the late 'seventies, by Mr. Joseph Chamberlain and his able coadjutor, Mr. Schnadhorst. Never

The Bir-
mingham
Caucus

¹ *Democracy and the Organisation of Political Parties*, by M. Ostrogorski (Eng. trans.) London, 1902.

before had party discipline been so strictly enforced, the result was seen in the capture of all three seats—despite the restricted vote and ‘minority’ representation—by the Radical Party. The success of the Birmingham ‘Six Hundred’ (as it was locally called), naturally led to imitation, first by the Liberal and afterwards by the Conservative Party. In 1877 a Conference met at Birmingham which resulted in the formation of the ‘National Federation of Liberal Associations’, or ‘National Liberal Federation’. For some time this new and democratically organized machine existed side by side with the central Liberal Association, but before long the newer virtually absorbed the older association.

Local
Organiza-
tion

There is now little difference between the organization of the two older parties. From the unit of the Ward or Polling Station, through the local association of the Borough or County division, up to the Central Union or Federation, it is throughout on a representative basis. As the ward committee or association sends its elected delegates to the local association, so the latter sends them to the central Council and Annual Meeting.

In almost every constituency some such organization exists, and generally commands the services of a full-time party agent. Some constituencies have women organizers as well as male agents. The admission of women to the franchise plainly necessitated an overhauling of the party machinery, but no uniformity has, as yet, resulted. Each constituency, though amenable to advice from Headquarters, is autonomous, and the local arrangements consequently vary. In some constituencies the associations are open to men and women indifferently, in others each sex has its completely separate organization, in others the two organizations co-operate and, for certain purposes (as for instance the selection of candidates), combine.

Agents

With the enormous extension of the electorate the work of the party agent tends to become increasingly important, and consequently political agency is rapidly becoming a regular and organized profession. The agent is, as a rule,

the servant of the local organization, though occasionally, where local organization is embryonic or non-existent, an agent is appointed and paid, wholly or partly, by the central organization of the party. The Labour Party, more frequently than the older parties, contributes to the salaries of agents. The relations of the agent with the member or candidate are necessarily close and confidential, and the latter, therefore, is frequently consulted as to his appointment, and often contributes, directly or indirectly, to his salary. The party agent commonly acts also as the election agent of the selected candidate but not necessarily, for the latter appointment is a legal one and must be made on the sole nomination of the candidate. The functions of an election agent are highly responsible, delicate, and even dangerous and candidates sometimes prefer to act as their own agents, as they are legally entitled to do. Such a course may curtail their legal liabilities, but it must increase a strain which is, in any case, exceedingly severe.

The primary purpose of all local organizations is, of course, to achieve, and having achieved to maintain, a majority in the constituency, and so to return the selected candidate of the party to Parliament. This purpose they seek to attain in three main ways: first, by constant attention to the register of parliamentary and local government electors, secondly, by the holding of periodical meetings, the issue of 'literature' and other means of propaganda, and, not least important, by the selection of suitable candidates both for parliamentary and local elections.

With local-government elections—for County, Municipal, District, and Parish Councils—this chapter cannot concern itself, but incidentally it may be said that there is an increasing tendency, despite all protestations to the contrary, to run such elections on strict party lines. This is much less true of rural than of urban districts, but the socialist challenge to the fundamentals of society has greatly emphasized a tendency already sufficiently notice-

Functions
of Local
Organiza-
tions

Parties
and Local
Elections

able As a result, the organization of local elections tends to fall more and more into the hands of local political associations and their professional agents, to whose duties they constitute a serious addition

The
Electoral
Register

The preparation of the Register is by the Act of 1918 committed to an official Registration Officer—the Clerk to the County Council and the Town Clerk for counties and boroughs respectively—whose duty it is to prepare and publish a complete register of qualified electors in the spring and autumn of each year. Formerly this duty was performed, in some cases rather negligently, by the overseers, whose work was revised in periodical courts held by barristers specially appointed for the purpose. Party agents were accustomed to appear before the 'Revising Barrister', and press or resist the claims of the partisans of their respective parties. This, indeed, constituted a considerable part of the agent's work, and he still performs it, though under circumstances which have greatly diminished both his labour and his responsibility, despite the fact that there are two editions of the register in the year instead of one.¹ The official preparation of the lists is far more thorough and systematic than it used to be, yet the agent's function is not, even yet, superfluous.

Propa-
ganda

Much more important, however, and much more continuous, is the work of 'educating' the electorate in the principles of the several parties. This work is done partly by holding meetings, formal and informal, partly by the circulation of party 'literature', partly through the medium of the local press, largely in the local clubs, and in connexion with every species of entertainment from a whist-drive to a dance. All parties have, in this last respect, followed the lead of the Primrose League, an elaborate organization, founded in 1883 by Lord Randolph Churchill and his colleagues of the 'Fourth Party', to perpetuate the memory and the principles of Lord Beaconsfield. Derided for its fantastic revival of neo-chivalry—

¹ Again reduced to one by the Economy (Miscellaneous Provisions) Act, 1926, 16 & 17 George V, c. 9

its hierarchy of Grand Masters and Ruling Councillors, Knights, and Dames, its banners and orders and decorations—the Primrose League has nevertheless taught the organizers of all parties lessons which they have been quick to learn, namely first to *attract* an audience, then to *amuse* it, and finally to *instruct* it. Easier social intercourse between all classes was one of the primary aims of a League which has now a record of forty years' work behind it. Denounced by opponents as the 'exploitation of snobbery', it has largely justified the hopes of those far-sighted Tories who perceived that the rapid extension of the electorate necessitated the adoption of new methods of political persuasion.

The *Primrose League* is, however, only one among many auxiliary organizations which have been established to promote one or more of the objects dear to the several parties. The Conservative Party enjoys the help of the 'Junior Imperial League', the 'Young Conservative Association', the 'Association of Conservative Clubs', and many similar associations. The Liberal Party has the 'Eighty Club' (a counterpart of the Conservative 'United Club'), the 'Union of University Liberal Societies', the 'National Reform Union', the 'National League of Young Liberals', the 'Liberal Research Department', and similar organizations. The Conservatives have their 'Philip Stott College', a fine country mansion in Northamptonshire, dedicated by the generosity of Sir Philip Stott to the political education of Conservative workers. The Liberals organize their peripatetic 'Summer Schools'. The Socialists have their still more highly organized 'Labour Colleges'.

Auxiliary
Political
Organiza-
tions

This rapid, and far from exhaustive, enumeration at least points to the amazing increase of educational and propagandist activities, among all political parties, in recent years. The work is done partly by volunteers, partly by paid workers. It is said—and greatly to their credit—that in the Socialist Party every individual member is a voluntary propagandist, and their opportunities

for propaganda are in some obvious respects vastly superior to those enjoyed by the older parties

Labour-
Socialist
Party
Organi-
zation

The organization of the Labour-Socialist Party differs substantially from that of Liberals and Conservatives. It is at once more rigid and less uniform. Discipline (as, for instance, in the selection of candidates and in control over the action of members) is much more strictly enforced, but on the other hand local organization is much less complete. Only in about one-fifth of the constituencies is there at present (1925) a regular party agent, though in some thirty-five other constituencies there is an agent appointed by one or other of the various 'affiliated organizations'.¹ It is proposed that candidates for appointment as agents shall be suitably trained and examined and shall be engaged under a regularized form of agreement between the Divisional Labour Party, as the employing body, and the agent. The proposed scale of remuneration for Labour Party agents is £260 per annum (in addition to necessary expenses), with annual increments of £10 up to £310. This scale does not materially differ from that obtaining in the other parties, though the maximum salary paid to Conservative agents is considerably in excess of the latter amount.

Like the older parties the Labour Party has its central office, under a National Agent, who is assisted by the chief woman officer and an appropriate staff. The Central Office is in close touch with the party in Parliament, the connexion being maintained by the appointment of the Secretary of the Labour Party² as Chief Whip in the House of Commons. Great Britain is mapped out into ten Districts (the Universities forming one), each under its own organizer, while the base of the pyramid is formed by no fewer than 3,130 divisional and local Labour Parties and Trade Councils. Out of the 602 constituencies in

¹ *Report of the Twenty-Fifth Annual Conference of the Labour Party* (1925), pp. 327.

² At present the Right Hon. Arthur Henderson, M.P., late Secretary of State for Home Affairs, to whom the writer wishes to acknowledge his obligations for information courteously afforded.

Great Britain there are now only two in which some form of Labour Party organization does not exist

For financial sustenance the party depends not, like the older parties, on the contributions of a comparatively small number of wealthy individuals, but on 'affiliation fees' paid by societies affiliated to the Labour Party. Finance In the year ending 31st December 1924 the fees from local Labour Parties and Trade Councils amounted to £1,189 15s 4d, and from Trade Unions and Socialist Societies, £36,079 10s 1d. Of affiliated Socialist Societies there are only seven, and of these only the Independent Labour Party, which claims 30,000 members, has a membership of over 2,000, while three do not exceed 500. It will be seen, therefore, that the Trade Unions are still, as they have been from the first, the backbone of the Labour Party. The membership of the latter rises and falls with the membership of the former, and the value of their support may be judged from the fact that in fourteen of the largest Trade Unions, with a total membership of over 1,800,000, only 43,430 individuals claimed exemption, under the Trade Union Act of 1913,¹ from the political levy. The votes cast for the several parties at Parliamentary Elections compel the inference that there are many thousands of Trade Unionists who vote Liberal or Conservative, but who either do not realize, or do not think it expedient to exercise, the right to exemption which they possess and might enjoy under the Act of 1913. Further discussion of this point might, however, lead to entanglement in current controversies, such as are quite outside the scope of this work.

The immediate object of all political organizations is, as already stated, the return of members of Parliament in sympathy with the several parties controlling them. Party Whips To this end the most important step is the selection of suitable candidates. In former days this selection was, to the last degree, haphazard. A local magnate or his nominee would be the first and most obvious choice

¹ 2 & 3 George V, c. 30

Failing such a candidate the matter rested largely in the hands of the Patronage Secretary to the Treasury, a minister whose office dates significantly from 1714. This official has, since the eighteenth century, acted as the Chief Whip of the party in power, and his multifarious, delicate, and exacting duties call for personal qualities not always found in combination in common clay. But not out of common clay is the ideal Whip made. He must know all the members of his party and all that can be known about them, their idiosyncrasies, their habits, their weaknesses (if they have any), and the ambitions (when they exist) of their families. His hand must be of iron, but the velvet glove must be habitually worn and readily doffed. He must be strong as adamant, but tactful and conciliating, slow to, but not incapable of, wrath. He is the chief *liaison* officer between the Prime Minister and the Cabinet on the one side, and the rank and file of the party on the other. The confidant of the former as regards policy and procedure, he must judge how much he can safely confide to the latter.

Candi-
dates

Formerly master of the machine, both in and out of Parliament, the Chief Whip shares his extra-parliamentary functions with the Chief Agent or Organizer and the Chairman of the Party.¹ Extra-parliamentary organization has, indeed, become so elaborate of late that the functions have now been largely differentiated, though the connexion must, unless party disaster is to ensue, be both closely and continuously maintained. Communications with the constituencies, the direction of propaganda, and the arrangement of party meetings are now mainly in the hands of the central office. In particular, 'Head-quarters' is, in the last resort, responsible for the provision of candidates. Central control, in this matter, has been carried farthest by the Labour Party, least far by the Conservatives. Every candidate recognized by the Labour Party

¹ Titles and, to a less extent, the articulation of functions differ in the three parties, but not materially, and the above description may be taken to describe all three with sufficient accuracy.

must be approved by the National Executive and must formally subscribe to the party programme 'Who pays the piper calls the tune' Discipline is less difficult to enforce when the party officials control the purse strings¹ In this, as in other parties, some freedom of choice is permitted to local organizations, but only within the limits prescribed by the rules of the party

In the Conservative Party the final selection of the candidates invariably rests with the Local Association, except in the few cases where no such Association exists If a candidate cannot be found locally, application is made to the Central Office, which generally submits two or three more or less suitable names 'Good' seats are, as a rule, filled without any recourse to Headquarters, for 'hopeless' or very doubtful constituencies, the Central Office generally has to find both candidates and funds The same is true of the Liberal Party, but financial assistance to candidates is more common in the Liberal than in the Conservative ranks Socialist candidates are generally financed by the party either from local or from central funds, in largest part, as already indicated, from the funds of the Trade Unions

The relations between Local Associations and candidates by no means cease with the election of the latter to Parliament The payment of members, first introduced in 1911, has undoubtedly produced some change in the status of Members of Parliament, and has tended to modify their relations with their constituencies The latter not unnaturally look for a more assiduous performance of parliamentary duties from stipendiary legislators than from their unpaid predecessors, and the independence of members has unquestionably been, in some measure, impaired But, in this matter, much obviously depends upon the financial relations between the member and his Local Association When a member has won the seat without assistance from local funds, and when, as is

Local
Associa-
tions ar
M P s

¹ Election funds too, in the Labour as in the older parties, locally raised, with contributions of varying amounts from the central funds, but it is by the Party, local or central, that funds are found

common, he also contributes largely to the upkeep of the local organization, he need not apprehend much interference from the 'caucus', though he naturally maintains close touch with it and with the local officials of his party. Too frequent indulgence in independent action in Parliament may, of course, evoke a protest from the 'caucus', and it persisted in against the wishes of the latter may eventuate in a refusal to endorse the candidature of the sitting member at the next election, or even, in an extreme case, in a demand for immediate resignation. The doctrine of the 'recall' has not yet, however, been embodied in English political practice, and a member is not under any legal obligation to accede to the demand that he should forthwith vacate his seat, but he may, under certain circumstances, feel morally constrained to do so. Should he feel obliged, in the course of a Parliament, to 'cross the floor', or in other words to change his party allegiance, he would ordinarily apply for the Chiltern Hundreds, and so vacate his seat.¹ He would then be free to offer or not to offer himself for re-election at his discretion. But, as a rule, such quarrels between a member and his Local Association are patched up until the dissolution. Discipline, it should be added, is much stricter in the Socialist Party than in either of the two older parties, but even in the older parties a member who is financially dependent upon the party is naturally under stricter discipline than a member who is not, though all members alike are subject to the discipline of the division lists.

The discipline of
Division
Lists

Those lists were first published in 1836, and their publication has inevitably tended in the direction deplored by Burke. Even now, however, a man of character, who maintains cordial relations with his constituents, need not and does not regard himself as a mere delegate.

'Faithful watchers', as Burke finely said, 'we ought to be over the rights and privileges of the people. But our duty, if

¹ The Stewardship of the Chiltern Hundreds (an obsolete office) is technically a place of profit under the Crown, the acceptance of which automatically renders a seat vacant. A member cannot technically 'resign'.

we are qualified for it as we ought, is to give them information and not to receive it from them. I reverentially look up to the opinion of the people, and with an awe that is almost superstitious. But to the detail of particular measures, or to any general schemes of policy, they have neither enough of speculation in the closet nor of experience of business to decide upon it.' ¹

'If,' he said elsewhere, 'we do not give confidence to [the] minds [of our representatives] and a liberal scope to their understandings, if we do not permit our members to act upon a very enlarged view of things, we shall at length infallibly degrade our national representation into a confused and scuffling bustle of local agency.' ²

Such sentiments may sound harshly in the ears of modern electors. Conditions have fundamentally altered since Burke's day, yet, despite increased publicity, despite the development of means of communication, despite the regular and almost continuous intercourse between members and their constituents, Burke's ideal remains true, and the more enlightened the constituency the less will it seek to hamper in the detailed discharge of his duties a member to whom it has really given its confidence. A member owes to his constituency something more than assiduity in attendance in Parliament, something more than regular participation in local functions, he owes to them the fruits of ripe experience, of specialized study, and of balanced judgement. This, rather than the other, wise constituents will look for, and, if forthcoming, will appreciate.

Yet the philosopher who was most insistent in his claim for the personal independence of Members of Parliament was also most emphatic in commendation of the system of Party Government. But that system presupposes, as we have already argued, agreement upon fundamentals. A foreign publicist, writing in 1907, emphasized this truth in a passage so striking as to justify quotation.

'To speak paradoxically, England possessed and still

¹ *Speech on a Bill for Shortening the Duration of Parliament* Works (ed. 1826), v. 76. Cf. *Appeal from the New to the Old Whigs*, vi. 116.

² *Speech at Bristol*, 1780, iii. 360-1.

possesses its system of Party Government through a Parliamentary Cabinet, by reason of its *lack of parties in the Continental sense*, because it is free from all internal contests which threaten national unity or attack the political and constitutional foundations upon which the Government of the Kingdom rests.¹

Must we, then, take final refuge in a paradox? Are we to ascribe the success of Party Government in England to the relative paucity of parties? For the converse proposition there would undoubtedly be much to be said. Dr Redlich would at least seem to be justified in ascribing the relative instability of Parliamentary institutions in certain continental countries, not merely to the existence of differences too fundamental for adjustment in a Representative Assembly, but also to the multiplication of parties and groups. Sir Courtenay Ilbert, a particularly close observer of our own Parliamentary Constitution, has declared that the Cabinet system presupposes not only a party system but a two-party system. He is thus in substantial agreement with the exceptionally competent foreign critic. Nor can it be questioned that England has thus far been exceedingly fortunate in avoiding the multiplication of Parliamentary groups. 'Third' parties have, from time to time, appeared upon the Parliamentary stage, more than once they have necessitated Coalition Ministries, but England has manifested little love for Coalitions, and electoral pressure has operated in favour of coalescence. Thus have the traditions of Representative Government been maintained, and the stability of Parliamentary institutions assured.

Success
and
stupidity

An explanation less flattering to national complacency was, indeed, suggested by Walter Bagehot. Writing from Paris in 1852 in defence of the *coup d'État* of Louis Napoleon, he raised the question whether Parliamentary institutions were not apt to succeed with a stupid people and founder with a ready-witted and vivacious people? Take the Romans, he said, 'They are the great political people

¹ Redlich, *op cit*, I, 129

of history Now is not a certain dullness their most visible characteristic ?' Compared with the nimble-witted Greeks where are the Romans in speculation, in abstract science, in literature ?

'Why do the stupid people always win and the clever people always lose ? I need hardly say that in real sound stupidity the English people are unrivalled You'll have more wit and better wit in an Irish street now than would keep Westminster Hall in humour for five weeks In fact what we opprobriously call stupidity, though not an enlivening quality in common society, is nature's favourite resource for preserving steadiness of conduct and consistency of opinion'¹

We may dismiss such sentiments as the mere ebullition of boyish levity, or evoked by characteristic love of humorous paradox, yet the youthful heresy hardened, as years went on, into something like a settled conviction And is there not a grain of good sense in the sack of chaff ? Racial characteristics proverbially afford dangerous ground for political generalization, but there would seem to be some warrant for the conclusion that free institutions have been more successfully worked by peoples commonly accounted phlegmatic in temperament than by their more vivacious neighbours

Be the explanation what it may, the fact remains that Parliamentary Government, with its indispensable adjunct of Party organization, has worked most continuously and most successfully in the country of origin

¹ *Literary Studies*, 1 329 Bigschof was only about 26 at the time (1852) the *Lettres on the French Coup d'État of 1851* were published in *The Inquirer* They are republished in vol 1 of the *Literary Studies*, and well repay perusal

EPILOGUE

' Consider what nation it is whereof ye are—a nation not beneath the reach of any point the highest that human capacity can soar to '

' Let not England forget her precedence of teaching nations how to live '—JOHN MILTON

' We have a form of Government not fetched by imitation from the laws of our neighbouring States (nay, we are rather a pattern to others than they to us) which, because in the administration it hath respect not to the few but to the multitude, is called a Democracy '—THOMAS BACON

' Many persons in whom familiarity has bred contempt may think it a trivial observation that the British Constitution, if not (as some call it) a holy thing, is a thing unique and remarkable. A series of undesigned changes brought it to such a condition, that satisfaction and impatience, the two great sources of political conduct, were both reasonably gratified under it. For this condition it became, not metaphorically, but literally, the envy of the world, and the world took on all sides to copying it '—SIR HILARY MAINE

' The best laws will be of no avail unless the young are trained by habit and education in the spirit of the Policy '—ARISTOTLE

AT the close of a monumental work on English Constitutional History a great historian-ecclesiastic claimed the right to 'moralize'. The foregoing pages are neither so weighty nor so lengthy as those in which Dr Stubbs traced the origins of the English Polity, yet a privilege similar to that claimed by the master may perhaps be conceded to one of the least, but not the least loyal, of his disciples.

The purpose of the present work has been primarily analytical—to expose the mechanism by which England is governed, and to bring into clear relief the characteristic features of the English Constitution, and to do this by constant reference to different species of the same genus. The writer has attempted during this process to preserve an attitude of scientific detachment and impartiality. But it would be disingenuous to pretend that he has not, throughout a long and arduous journey, been sustained by the conviction, deepening as his investigations proceeded, that his own countrymen, whether by good fortune or by

Moralizing

Excellence of the English Polity

following a sure political instinct, have succeeded in working out a system of government, admirably adapted to attain under the peculiar conditions of the modern State the primary ends of government—order, liberty, and progress.

The
truths of
Political
Science
not absolute
but
relative

By no means, however, does it follow that the form of government first evolved in England, and described throughout the foregoing pages as Parliamentary Democracy, is equally well adapted to all other countries whatever be the stage of development, economic, social, or political, they may severally have reached, nor, indeed, to any other country at any stage. If there be one aphorism in Political Science which should command universal assent, it is that its conclusions are not absolute but relative. Aristotle shrewdly observed that 'political writers, although they have excellent ideas, are often unpractical', and insisted that the 'true legislator and statesman ought to be acquainted, not only with that form of government which is best in the abstract, but also that which is best relatively to circumstances. There is certainly more than one form of democracy and of oligarchy, nor are the same laws equally suited to all'.¹ For the average State, however, Aristotle himself inclined to the mean between Oligarchy and Democracy, for 'no other is free from faction'. 'It is manifest that the best political community is formed by citizens of the middle class, and those States are likely to be well administered in which the middle class is large and large, if possible, than both the other classes'.² These observations would seem to point to a mixed form of Constitution as best for the average State—'for the State is better which is made up of numerous elements and combines many forms'. Nevertheless, everything must be judged 'relatively to given conditions'—absolutely best form there is none.

The truths proclaimed by philosophy have been substantiated by experience. Were an Englishman to suggest that England possesses a monopoly of political wisdom,

¹ *Politics*, IV 1

² *Ibid.*, IV 11 8

and that only in the English Constitution can the secret of good government be discovered, he would be self-convicted of unpardonable arrogance. A foreign critic has, indeed, declared that only in England has the problem which confronts the modern State been satisfactorily solved. 'To restrain and guide democracy, without debasing it,' wrote Montalembert, 'to regulate and reconcile it with a liberal monarchy or a conservative republic—such is the problem of our age; but it is a problem which has been as yet nowhere solved except in England.'¹ Even in 1855, when those words were written, the validity of Montalembert's conclusion might have been disputed; it would be hotly denied in many countries to-day, and not only in those which have borrowed from England the model of a Parliamentary Democracy.

Alike in Switzerland and in the United States the principle of Federalism is a vital and inseparable element in the Constitution. In the English Constitution it is only faintly perceptible. On the other hand, the United States has repudiated the system of Cabinet Government, which is rightly regarded as a cardinal principle of the English Polity; nor has that system been really adopted in Switzerland.

The
Federal
Principle

Must we then conclude that Parliamentary Government, as understood in England, is incompatible with Federalism? In the Commonwealth of Australia an attempt has been made to combine the two principles; but the path of Parliamentary Democracy has not been entirely smooth in Australia, and, in any case, the experiment is too recent to justify a general or positive conclusion. Meanwhile, the federal principle is as deeply rooted in the soil of America as is the principle of Parliamentary Government in that of England; nor, despite some criticism, in each case, of the existing system, and notwithstanding some movements of opinion, mostly academic in origin, towards Parliamentary Government in America and towards Federalism in England, each country remains firmly, and

¹ *The Political Future of England*, p. 36.

as would appear, unalterably attached to the principle which respectively dominates and differentiates its own Constitution

Commen-
tators
on the
English
Constitu-
tion

If our own Constitution has suffered critics it has not lacked eulogists. For more than four hundred years the English Constitution has been almost as much an object of admiration to foreigners as of pride to Englishmen. Philippe de Comines (1445-1509), the famous French historian, declared 'In my opinion among all the lordships that I know in the world, England is the one where the public good is best attended to and where there is the least violence on the people'.¹

Sir John
Fortescue

Almost contemporary with Comines was Sir John Fortescue (? 1394-1476), Chief Justice of the King's Bench under Henry VI, and the first Englishman to analyse the essential characteristics of the English Constitution. Sir Edward Coke declared that Fortescue's famous dialogue, *De Laudibus Legum Angliæ*, written about 1470 for the instruction of Edward, Prince of Wales, was worthy of being written in letters of gold. More important, however, as a commentary—and the first commentary on the Constitution—is the treatise originally entitled *The Difference between Absolute and Limited Monarchy as it more particularly regards the English Constitution*, but more commonly known as *The Government of England*. This treatise, which was not published until 1714, deals, as its first editor² explained, with 'the most excellent and curious part of the law, the English Constitution'. The author, he truly adds, was 'a great lover and vindicator of it' and had an 'exact knowledge in all the parts thereof'. The piety of the first Lord Fortescue in no wise exaggerated the erudition or the acumen of his ancestor, and the treatise—particularly as re-edited by Mr Charles Plummer—still possesses a critical as well as an historical value.³

Sir
Thomas
Smith

Even more significant than Fortescue's work was the

¹ *Memoires de Comines*, Bk. V, c. xlviii.

² Sir John Fortescue-Aland (1670-1746), a Justice of the Court of King's Bench and afterwards first Baron Fortescue of Criccan.

³ Oxford, Clarendon Press, 1885.

De Republica Anglorum; the Maner of Governement or Policie of the Realm of England, written by Sir Thomas Smyth or Smith during his embassy to France (1562-6). Smith (1513-77) was distinguished both as scholar and statesman, having been at one time Professor of Civil Law and Vice-Chancellor of the University of Cambridge, and at others Ambassador in France and Secretary of State to Queen Elizabeth. Strype, who wrote his life (1698), described him as 'the best scholar in his time, a most admirable philosopher, orator, linguist, and moralist . . . a very wise statesman, and a person withal of most unalterable integrity and justice (which he made his *politics* to comport with), and lastly a constant embracer of the reformed religion'. A more recent critic has pronounced his work on *The Commonwealth of England* (the title borne by the *De Republica* in the editions from 1589 onwards) as 'the most important description of the Constitution and Government of England written in the Tudor age'.¹ It was that and much more. It was the first scientific treatise on Comparative Politics in the English tongue. No fewer than eleven editions of the book in English were published between 1584 and 1691; four editions of a Latin translation were published between 1610 and 1641, and the work was also translated into Dutch and German. The treatise, according to Strype, was evoked by certain discourses Sir Thomas had with some learned men in France,

'concerning the variety of Commonwealths; wherein some did endeavour to undervalue the English Government in comparison with that in other countries, where the civil law took place. His drift herein was . . . to set before us the principal points wherein the English polity at that time differed from that used in France, Italy, Spain, Germany, and all other countries which followed the civil law of the Romans . . . to see which had taken the more right, truer, and more commodious way to govern the people as well in war as in peace.'

¹ A. F. Pollard, ap. *D.N.B.*, lili, p. 127. The most recent edition of the work is that edited by L. Alston with preface by F. W. Maitland, Cambridge University Press, 1906.

'I think,' wrote the author to a learned friend, 'when you have read it over, you will acknowledge that I was not carelessly conversant in our Country's Commonwealth' This modest claim has been abundantly conceded by all who have since attempted to follow in the path first traced by Sir Thomas Smith. He was, indeed, conversant in the English Constitution. He describes with accuracy and precision the position of the Crown—its 'absolute' authority in peace and war, its functions as the fount of honour and the dispenser of patronage, its prerogative of mercy, and the fact that 'all writs, executions, and commandments be done in the prince's name'. Of still greater interest, particularly in view of the period at which the book was written, is his insistence upon the doctrine of Parliamentary Sovereignty.¹

In respect of this cardinal doctrine of the English Constitution the successors of Sir Thomas Smith, from Blackstone to Dicey, have had little to do save to adorn it. Of those successors only brief mention can here be made. The disturbances of the seventeenth century inevitably produced a large crop of political pamphlets, but few of them can be said to have made any permanent contribution to political thought, or even to a better understanding of English institutions. James Harrington's *Oceana* (1656) belongs rather to the category of political *Utopias* than scientific treatises, but it contains some remarkable anticipations of reforms, subsequently effected, in parliamentary representation, in electoral procedure, and in education. It was followed by a large number of works from the same prolific pen dealing with the science and art of Government.² But to the latter no permanent value can be attached.

The
Poets

It is otherwise with the tractates—or some of the tractates—of Milton. Almost all keenly controversial, many of them essentially *livres de circonstance*, they nevertho-

¹ See *supra*, pp. 29, 30, where the specific passage is quoted.

² e.g. *The Prerogatives of Popular Government*, 1659, *Seven Models of a Commonwealth*, *Political Discourses*, 1660.

less contain, besides isolated passages of superb and stately eloquence, much political speculation of enduring value. Sir Henry Taylor hazarded the opinion that our great poets have been our best political philosophers, and that 'the poetry of this country is its chief storehouse of political wisdom'.¹ To that storehouse Milton certainly contributed, notably in the *Areopagitica*, while his essay *Of Reformation in England* contains at least one splendid apostrophe, already quoted, to the characteristic excellence of the English Constitution, its equilibrium and balance of political forces.²

The moderation of the English character reflected in English institutions is lauded alike by the poet of the Restoration and by the most representative of the Victorian poets

Such impious axioms foolishly they show,
For in some souls republics will not grow,
Our temperate isle will no extremes sustain
Of popular sway or arbitrary reign,
But slides between them both into the best,
Secure in freedom in a monarch blest

Thus Dryden in his 'Satire against Seditious', *The Medal*. Even more familiar is Tennyson's *Of Old sat Freedom*, which re-echoes the sentiment of Dryden

Gave mother of majestic works
From her isle-altar gazing down,
Who, god-like, grasps the triple forks
And, king-like, wears the crown

Turning to scorn with lips divine
The falsehood of extremes

Of Bolingbroke and Burke, the outstanding political commentators of the eighteenth century, mention has been made in a previous chapter, and a passing reference will suffice for such writers as Nathaniel Bacon, whose *Government of England* (from Selden's notes) appeared in 1760. De Lolme, however, belongs to a different category

The Eighteenth century

¹ *Critical Essays*, p. vii

² *Supra*, p. 150

Like Rousseau, De Lolme was a native of Geneva, but, unlike Rousseau, he conceived a warm admiration for the English Constitution. De Lolme's once-famous work, *The Constitution of England, or an Account of the English Government, in which it is compared with the republican form of government and the other monarchies in Europe*, was first published in French at Amsterdam, 1771, and four years later in English. It went through at least eight editions in its English dress, besides several in French and German. It is a curious fact that the preface to the *Letters of Junius*—written not later than November 1771 and published in 1772—concludes with a quotation from De Lolme's work (which is there described as a 'performance, deep, solid, and ingenious'),¹ verbally identical with the passage as it appeared in the English translation, four years afterwards (1775).² On the strength of this coincidence was based the conjecture that the *Letters* were written by De Lolme, but, though supported in an elaborate argument by Dr Bushby, the conjecture was never seriously entertained.³ Disraeli described De Lolme as 'the English Montesquieu', Mr William Hughes Hughes, M.P. for the City of Oxford, who re-edited *The Constitution of England* in 1834, extolled it as 'the most approved treatise which has yet appeared on the Constitution of England', while another legislator of the same period, in presenting a copy of the work to the youthful Queen Maria of Portugal (September 1833), declared that the work 'deserved to be written in letters of gold and was worthy the consideration of every crowned head in Europe'.⁴

Whether this ample claim be admitted in its integrity or no, it is certainly true that De Lolme's work possesses a value more than merely historical. His style is vivacious and his observation acute. Writing in the midst of the

¹ The passage refers to the Liberty of the Press.

DNB s.v. De Lolme, xiv, pp. 325-7.

² *Arguments and Facts demonstrating that the Letters of Junius were written by John Louis de Lolme, Advocate* (1816).

⁴ I. I. Bruce, M.P. for East Surrey, *ap.* Preface to edit. of 1834.

contest between the Mother Country and the American Colonies, De Lolme can nevertheless extol the 'peculiar *stability* of the executive power of the British Crown', and can appreciate the 'advantages that result from that stability in favour of public liberty'. Those advantages he summarizes as follows: (i) The numerous restraints the governing authority is able to bear and the extensive freedom it can afford to allow the subject at its own expense, (ii) the liberty of speaking and writing carried to the great extent it is in England, (iii) the unbounded freedom of the debates in the legislature, (iv) the power to bear the constant union of all orders of subjects against its prerogatives, (v) the freedom allowed to all individuals to take an active part in Government concerns, (vi) The strict impartiality with which justice is dealt to all subjects, (vii) the lenity of the criminal law, (viii) the strict compliance of the governing authority with the letter of the law, (ix) the needlessness of an armed force to support itself, and, as a consequence, the singular subjection of the military to the civil power. These advantages, De Lolme justly observed, are peculiar to England, nor was he slow to perceive that 'the attempt to imitate them, or transfer them to other countries, without at the same time transferring the whole order and conjunction of circumstances in the English Government, would prove unsuccessful'.

De Lolme has a further claim to honourable mention as the lineal predecessor of Bagehot, Dicey, Boutmy, and Gneist. His Survey is indeed more comprehensive than that undertaken by any of these later commentators, and is hardly less lively than Bagehot's. He anticipates Boutmy in his insistence upon the significance to be attached to the precocious centralization of the English administrative system, and he emphasizes, hardly less strongly than Dicey, the doctrine of Parliamentary Sovereignty and the importance of the Rule of Law. 'The basis of the English Constitution,' he writes, 'the capital principle on which all others depend, is, that the legis-

lative power belongs to Parliament alone,' but he is careful to add 'The constituent parts of Parliament are the King, the House of Lords, and the House of Commons' ¹

Sir Here, and elsewhere, De Lolme was evidently indebted William Blackstone in no ordinary measure to Blackstone's great work, the first part of which was published in 1765 Blackstone, like other university teachers since his day, appears to have suffered from piracy Imperfect reports of his lectures had got into circulation and some had fallen 'into mercenary hands and become the object of clandestine sale' ² Since this piracy determined Blackstone to publish his famous *Commentaries*, we can scarcely regret it, nor could Blackstone, as the sale of the book is said to have brought him about £14,000

The earlier portion of the book, which deals mainly with what we now know as the Law of the Constitution, contains a superb vindication of the 'vigour of our free Constitution' ³ the executive power lodged in a single person, the origin and nature of the Royal prerogative, the legislative sovereignty of Parliament, the distribution of legislative power between King, Lords, and Commons, the liberty of the subject and his free enjoyment of personal security, of personal liberty, and of private property, the regular administration and free course of justice in the Courts of Law, the delicate equilibrium of the several forces within the State—all this has now become the commonplace of criticism and commentary, but to Blackstone belongs the credit of having been the

¹ p. 50 (ed. 1834)

² I am far from suggesting that De Lolme's hands were unscrupulous, or the sale of his book 'clandestine' But still how can I endorse or even understand Bentham's sneer at Blackstone 'It is to a foreigner we were destined to owe the best idea that has yet been given of a subject so much our own (the British Constitution) Our author (Blackstone) has copied, but De Lolme has thought' *Fragment on Government*, c. III, § XVI The dates entirely contradict Bentham's venomous suggestion, De Lolme's book, as we have seen, was first published in French in 1771 Blackstone was lecturing on the subject at Oxford from 1753 onwards, if not earlier, and the first part of the *Commentaries* was actually published in 1765

³ 1. 27 (all the references are to the edition of 1834)

first to analyse, systematically and adequately, the legal principles on which the Constitution rested

Not that Blackstone's analysis remained exempt from criticism. Of his critics the most caustic, perhaps the most captious, was Jeremy Bentham. Bentham, while admitting that Blackstone 'first of all institutional writers, has taught jurisprudence to speak the language of the scholar and gentleman', bitterly denounced his intolerance and derided his superficiality.

Jeremy
Bentham

'His hand was formed to embellish and to corrupt everything it touches. He makes men think they see in order to prevent their seeing. He is infected with the foul stench of intolerance. In him every prejudice has an advocate, and every professional chicanery an accomplice. He carries the dissingenuousness of the hunching advocate into the chair of the professor.'¹

Bentham's specific answer to Blackstone was contained in the treatise entitled *A Fragment on Government or a Comment on the Commentaries, being an Examination of what is delivered on the Subject of Government in General in the Introduction to Sir William Blackstone's Commentaries, with a Preface in which is given a Critique on the work at large*. The main object of this 'Fragment', first published anonymously in 1776, was to expose the capital blemishes of a work which not only showed in substance an 'antipathy to reformation', but was also distinguished by 'a general vein of obscure and crooked reasoning from whence no clear and sterling knowledge could be derived'. The tone of Bentham's criticism may be judged from these sentences, but the 'Fragment' was far from being, in substance, purely destructive. Without going so far as to describe it as 'a model of controversial literature', we may agree that the book does mark 'a new departure in jurisprudence'. As J. S. Mill truly said, Bentham 'found the philosophy of law a chaos, he left it a science'. He was a stern critic of loose phraseology, of unverified hypo-

¹ Extracts from Bentham's *Commonplace Book, Works*, x. 141 (ed. 1843).

theses, of vague generalizations, but he was also constructive. Everything in Law, in Government, in Ethics, was to be brought to the test of utility. 'It is the principle of *utility*, accurately apprehended and steadily applied, that affords the only clew to guide a man through these streights.'¹ But the primary purpose of the 'Fragment' was to inculcate a mistrust of authority and tradition. 'Let the timid and admiring student place less confidence in the infallibility of great names, emancipate his judgment from the shackles of authority, distinguish between shewy language and sound sense.'² Such is the adjuration with which the 'Fragment' concludes.

The Nine-
teenth
Century

The outbreak of the Revolution in France evoked one masterpiece of political literature, but to Burke's classical apology for English institutions reference has already been made, and the retorts of Sir James Mackintosh and others do not in the present connexion demand notice.

Whig
Writers

With the return of peace there came a revival of the agitation for parliamentary reform. In the forefront of that agitation stood the great Whig statesman who embodied his views in books of some political significance if not of great historical value. Lord John (afterwards Earl) Russell's *Essay on the History of the English Government and Constitution* was first published in 1821.

The brief outline of English history from Henry VII to George III has no special interest, but the analytical portions of the book, dealing with such topics as personal and political liberty, the rise of public credit, party government, the poor laws, are by no means without value. Especially is this true of the concluding chapter appended to the edition of 1865, and containing a retrospect of events from 1820 to 1864, as seen by one who had grown grey in the service of the State. Lord Russell's account of the circumstances which attended the preparation and enactment of the Reform Bill of 1832, and his comments thereon, constitute, indeed, an historical document of first-rate importance.

¹ *Fragment*, iv. xx

² *Ibid.*, lxxxv

Two other Whig statesmen of the period also made their contributions to this subject. Lord Brougham's book, *The British Constitution, its History, Structure, and Working*, was first published in 1858, as was Earl Grey's *Parliamentary Government considered with reference to Reform*.¹ Lord Brougham's work is more of a treatise in Political Science than its title would suggest, and amid the scant literature of this subject in English is far from negligible. The historical narrative is confined to some half-dozen chapters and possesses no special value. The bulk of the book is, however, critical and analytical, and, containing the reflections of a singularly acute mind, will amply repay perusal. Starting with a discussion of the classification of governments, Brougham passes to a consideration of the virtues and vices of mixed government, concluding that the balance is wholly in favour of it. No fewer than eight chapters are thus devoted to the history and theory of representative democracy. The corner-stone of the structure of the English Constitution Lord Brougham finds—as befits so pugnacious a politician—in the doctrine of 'Resistance' (c. xvii), though he acknowledges that 'the pure constitution of Parliament—the extended basis of our popular representation' will 'always render a recourse to the right of resistance less needful'. The three principal defects in the House of Commons seemed to him to be its 'preposterously' large numbers (658), the 'want of close boroughs or some substitute for them', and the consequent lack of any means of 'placing great Government functionaries in the House of Commons', and the multiplication of small boroughs—the haunts of bribery, hotbeds of every species of corruption—by the Reform Bill of 1832. To cure this evil he advocated the division of the whole country into electoral districts, on the French plan. The most interesting and most significant part of the work is contained in three appendices (there is a fourth dealing with the Government of Athens).

¹ Henry, third Earl Grey—son and successor of 'Grey of the Reform Bill'.

devoted to an analysis of Federalism and a survey of the Governments of Holland, Belgium, and the United States. Only at this point does Brougham adopt the comparative method in Political Science.

Lord Grey, as befitted the son of his father, devoted his essay to the single topic of Parliamentary Government, and a discussion of the means by which further reforms in that system could be best effected. Taking as his text Burke's aphorism 'The machine of a free Constitution is no simple thing, but as intricate and delicate as it is valuable', he proceeded to explore the advantages and disadvantages of Parliamentary Government and to make his own suggestions for that further reform which, though admittedly inevitable, he evidently regarded with considerable apprehension. This mood was not by any means uncommon, in the late 'fifties and early 'sixties, among men of intellect and education, and many were the devices suggested to safeguard the Constitution amid the multiplying dangers of 'pure democracy'. Of these devices several—such as the cumulative vote, the increased representation of universities, the inclusion of life-members in the House of Commons, a method of indirect election—found favour with the rather doctrinaire mind of Lord Grey. A chapter on Parliamentary Government in the British Colonies has considerable historical interest.

Homer-
sham
Cox

Among the Whig writers of this period Homersham Cox deserves a passing reference. He was the author of several works on History and Politics, at least one of which, *The British Commonwealth, or a Commentary on the Institutions and Principles of British Government* (1854), cannot, in the present connexion, be ignored. In some respects it was the most scientific survey of English Political Institutions which had up till then appeared. He stated, indeed, in his preface that he had been unable, despite careful inquiry, 'to discover any book in which the modern principles of the British Constitution are systematically discussed and elucidated by reference to the actual state and numerous institutions of our Government'. My own researches have

tended to a similar conclusion. This evident deficiency Mr Cox essayed to supply, and he achieved no inconsiderable measure of success. Starting with an inquiry into the rights and duties of Government, he proceeded to analyse the composition and discuss the functions of the Legislature, with special reference to parliamentary procedure. Under the general head of the Legislature he included not only the Cabinet and political parties, but the whole apparatus of parliamentary representation, public meetings, and the Press. Other portions of the work dealt with the Judiciary, the Administrative System, International Affairs, and Colonial Government. He concluded with a just and temperate appreciation of the British Constitution, the main scheme of which he found to consist in 'mutual restraint' and 'reciprocal responsibilities'. The most obvious weakness of the existing system was discovered to lie in the 'overwhelming influence of small corruptible or coercible constituencies', and in the consequent corruption of the House of Commons itself. Athens and Rome perished of the same disease. 'By the national corruption they wrought their own chains, and then the hand of Despotism did but fasten them on' (p. 571). But in the England of the 'fifties the root of the evil seemed to him to be economic. 'Incomparably the most momentous question of English politics now is the remedy of the pauperism and depravity of the very poor' (p. 573). Admiring as the British Constitution was it would be time enough to deem it perfect when these social evils were remedied. The value of Cox's work was much enhanced by a copious bibliography, a feature conspicuous by its absence in the works of his contemporaries.

Disraeli's *Vindication of the English Constitution* (1835), preceded by about twenty years the works of the writers just noticed, and belongs to a somewhat different category. According to Disraeli himself the dissertations upon our Constitution might hitherto have been classified either as 'archaeological treatises or party manifestoes'. If we are to accept the classification as exclusive the

Vindication must be included among the latter. Like Bolingbroke's *Patriot King* it was primarily a party pamphlet, but a considerable and not unserviceable veneer of philosophy and history justifies its inclusion in the present survey.

Disraeli's wrath was directed, primarily, against the utilitarians, with their 'anticonstitutional' creed, their 'barren assertions of abstract rights' and their love for 'a priori systems of politics'. Their tendency was 'to form political institutions on abstract principles of theoretic science, instead of permitting them to spring from the course of events, and to be naturally created by the necessities of nations'. Not thus did our forefathers gradually build up our Constitution. 'They set up no new title they claimed their inheritance. They established the liberties of Englishmen as a life-estate, which their descendants might enjoy, but could not abuse by committing waste, or forfeit, by any false or fraudulent conveyance. They entailed our freedom.' Disraeli approved this as heartily as Bolingbroke or Burke. 'This respect for Precedent, this clinging to Prescription, this reverence for Antiquity appear to me to have their origin in a profound knowledge of human nature, and in a fine observation of public affairs, and satisfactorily to account for the permanent character of our liberties' (pp. 15, 19, 23).

From criticism of the English utilitarians Disraeli passed on to denounce the French republicans, who in 1791 built their fabric upon the abstract rights of man and 'boldly seized equality for their basis'. Not less conspicuous was the folly of that innocent monarch, Louis XVIII, who 'presented his countrymen with a free Constitution—drawn up in a morning', thus achieving at one stroke that 'which in less favoured England has required nearly a thousand years for its accomplishment'. But the 'climax of human absurdity was reached when the 'Anglo-Gallic scheme' was 'gravely introduced to the consideration of the Lazzaroni of Naples and the Hidalgos of Spain' (pp. 34, 35). The 'Revolution' of 1830 in France is next

contrasted with the Revolution of 1688 in England, and with the prudent policy of Frederick William III when confronted with the demand for a 'Constitution' in Prussia. The Constitution of the United States seemed likely, Disraeli observed, to exercise over South America the same fatal influence as that of England over Europe—all which goes to show that 'Constitutions' to be of any value must be native-born and not imported.

Upon this there followed a brilliant sketch—of course taken from a special standpoint—of the development of English institutions, from the rise of Parliament to the successful struggle of George III against the 'Whig Oligarchs'. Reasons are advanced why the Whigs ever have been and ever must be 'odious to the English nation, and why the principles of democratic Toryism—first taught by Bolingbroke—can alone save it'.

'Our society', such is the conclusion reached by Disraeli, 'is that of a complete democracy, headed by an hereditary chief, the Executive and Legislative functions performed by two privileged classes of the community, the whole body of the nation entitled, if duly qualified, to participate in the exercise of those functions, and constantly participating in them' (p. 204).

To the principles thus enunciated by the young pamphleteer the politician remained constant throughout life, but it is only with the exponent of the Constitution that we are here concerned. Beneath the affectation of extravagance, and despite much partisan embellishment, there yet lay in the *Vindication* a large residuum of sober reasoning and sound history. Much of the solid argument was borrowed from Burke's *Reflections*, though Disraeli utilized it to serve an immediate party end—to discredit the Whigs, and to vindicate the claim of the Tories to be a truly national party. But the pursuit of a proximate purpose does not really destroy the permanent value of a treatise in which, as in the novels yet to come—notably *Sybil*—the true mind of Disraeli must be sought and can be found.

Walter
Bagehot

From the political aspirant to the philosophical publicist may seem to be an abrupt transition. In fact, some thirty years separated the publication of Disraeli's *Vindication* from that of Walter Bagehot's *English Constitution*.¹ The latter has long been accepted as one of the classics of English literature, belonging, as an acute critic has recently observed, to a small group of books 'in which scientific subjects are endowed with literary interest by sheer perspicuity of style and sustained animation of interest'.²

Bagehot's *English Constitution* stands apart from all other treatises on the subject known to me, not merely by reason of its perspicuity, or its 'objectivity'—though Bagehot possessed, in exceptional measure, the Baconian propensity to 'work upon stuff'—but rather by reason of its almost uncanny common sense—its resolute determination to pierce through time-honoured phrases to concrete realities. Yet despite his reverence for 'reality', Bagehot never undervalued the 'dignified' parts of the Constitution. Quite otherwise 'The use of the Queen in a dignified capacity is incalculable'. 'A Constitutional Monarchy has a comprehensible element for the vacant many, as well as complex laws and notions for the inquiring few'.

Some aspects of the practical usefulness of the Monarchy Bagehot also perceived, if he did not adequately appreciate them: others he could not, in 1867, have been expected to know, still less to foresee. Few people could then realize with what splendid devotion and assiduity the Queen, though withdrawn from the public eye, 'continued to stand sentinel to the business of her Empire'. From her published Letters the world has since learnt that 'the retired widow of Windsor' never for an instant relaxed her grip upon public affairs. But the conditions were very different from what they afterwards became. Disraeli had not yet conferred upon his mistress the new title of Empress of India, nor had the nations of the British

¹ *Fortnightly Review* (1865), republished in 1867 (2nd ed. 1872)
Times Literary Supplement, 28 January 1926

Commonwealth reached that stage of evolution when they consciously recognized the Monarchy as the 'golden link' of Empire.

The utility of the Second Chamber, restricted though it was by the Reform Act of 1832, Bagehot could and did appreciate. He was too clear of vision to persuade himself that the House of Lords still retained powers co-ordinate with those of the Commons ; but although 'with a perfect House of Commons' a Second Chamber might be unnecessary, in the actual, and still imperfect, political world it had a useful part to play as a delaying, revising, and referendal Chamber.

It was, however, on the Cabinet that Bagehot fixed, with sure instinct, as the motive power in the complicated machine of State. His chapters on the Cabinet were, from their first appearance, recognized as classical. No one, up till then, had analysed the *efficient* side of the Constitution with the same pitiless lucidity that Bagehot employed. Tossing aside all the old shibboleths and dogmas, ruthlessly rejecting the theory of the Constitution consecrated by the genius of Montesquieu and elaborated by Blackstone, Bagehot in his very first chapter pierced unerringly to the heart of the mystery. The peculiar genius of the English Constitution was discovered to consist not in the separation but in 'the close union, the nearly complete fusion' of Executive and Legislative functions, and the connecting link was the Cabinet.

Again, Bagehot was almost, if not quite, the first English publicist to draw out a critical comparison between the English and American Constitutions. Nor was it surprising that, having fixed upon the Cabinet as the cardinal feature of the English Constitution, he should contrast with it a presidential Executive. On the whole, the balance of advantage seemed to him to lie decidedly with the parliamentary type of democracy. The presidential system was not seen at its best in the 'sixties, and Bagehot was quick to detect its deficiencies. Alike from the point of view of the Executive and the Legislature the

English system seemed to him to yield better results. But with these matters we have already dealt. Here we are concerned only with Bagehot's place in the evolution of political criticism. That place is in a sense unique and is unquestionably secure. His object was to 'break up obsolete traditions on an important subject', to induce the critics to treat it 'according to the sight of their eyes and not according to the hearing of their ears'. The first object he triumphantly achieved, in regard to the second he might deserve but could not command success.

Must we add that Bagehot enjoyed an advantage denied to the critics that followed him? Is it true that his survey of Parliamentary Government coincided with its meridian, and that, since his day, the perfect equilibrium of forces, on which depends the success of that most delicate of political instruments, has been somewhat disturbed? To this point of view some attention has already been given.¹ It must suffice to recall the fact that Bagehot wrote at the close of the intermediate period between the overthrow of the territorial oligarchy and the advent of democracy. Disraeli had not yet 'shot Niagara', the Reform Acts of 1832, 1832, 1832, 1832, and 1832 were still farther in the future. The publication of a second edition of *The English Constitution* (1832) did, indeed, afford the author an opportunity, utilized in a masterly introduction, of discussing Disraeli's astute if audacious 'leap in the dark', but the ultimate results of the experiment thus initiated not even Bagehot could have forecast.

Among Bagehot's successors the one who has followed most closely and most successfully in his footsteps is Sir Sidney Low, whose *Governance of England* (1904) was, however, something more than a 'Bagehot up to date'. Honourable mention should also be made of W. E. Hearn's *Government of England* (1867), and I, at least, should be lacking in common gratitude if I did not refer to A. de Fonblanque's *How we are Governed*. First published in 1858, this little book is, I imagine, almost forgotten, but

¹ *Supra*, Book III.

desiccated as its pages now seem, it first aroused the boyish interest of the present writer in the actual working of English institutions

In a different category of importance are the works of Maine, Lecky, and Dicey, who, with Sir Sidney Low, most nearly reflect contemporary criticism. Before passing to them brief reference must be made to some foreign commentators on the English Constitution

Among these one of the first and one of the greatest was the Baron de Montesquieu (1689-1755). To his famous doctrine of the 'separation of powers' frequent reference has been made in preceding chapters, but some words must here be added to emphasize the importance of the place he occupies in the history of Political Theory. That many of his generalizations have been proved to be inaccurate is of little moment. As Buckle justly observed, 'such inaccuracies were inevitable in the case of a profoundly speculative genius dealing with intractable materials. Science had not, in his day, reduced those materials to order by generalizing the laws of their phenomena.'¹ Some of Sir Henry Maine's conclusions have been similarly contradicted by the progress of sociological research, but both in Maine's case and in Montesquieu's the permanent value of their work as pioneers in the application of the historical method remains unaffected by subsequent discoveries.

Foreign
Commen-
tators
Montes-
quieu

English publicists have special reason to be grateful to Montesquieu for the searching analysis to which he subjected political institutions in general and English institutions in particular. Truly did Madison write

'The British Constitution was to Montesquieu what Homer has been to the didactic writers on Epic poetry. As the latter have considered the work of the immortal bard as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged, so this great political critic appears to have viewed the Constitution of England as the standard, or to use his own expression,

¹ *History of Civilization* 1 571 seq.

as the mirror of political liberty, and to have delivered, in the form of elementary truths, the several characteristic principles of that particular system ' ¹

Montesquieu may, in some measure, have exaggerated the degree in which, even in the England of that day, the executive, the legislative, and the judicial power were separated each from the other, but his general meaning is clear and is accurately interpreted by Madison. It amounts, indeed, to no more than this that 'when the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free Constitution are subverted.' Thus the Executive, in the person of the King, forms a *part* of the Legislature. The Executive, again, is responsible for the appointment of the Judiciary, while the House of Lords exercises judicial authority. It was, however, the supreme merit of Montesquieu to have been the first to perceive that the functions are distinct, and that in the Constitution, which seemed to him to afford the best guarantee of personal and political liberty, the separate functions were, in large measure, entrusted to separate bodies. Nor has the theory of representative, as opposed to direct democracy, ever been more clearly expounded than by Montesquieu ²

Even more remarkable, in view of the fact that he died in 1755, is Montesquieu's acute perception of the advantage of the federal form of Government ³. To his views on Federalism sufficient reference has, however, already been made.

Mont-
alembert

Less well known as a eulogist of English institutions, but not less fervid than Montesquieu, was Charles Forbes René de Montalembert. The son of an *émigré*, Montalembert was born in London in 1810. Deeply imbued with liberal ideas, he was nevertheless a fervent believer in the value of tradition, and few writers have more eloquently

¹ *The Federalist*, No. xlvii

² *Œuvres* XI, c. vi, pp. 266 seq. (ed. Bastien, 1788)

extolled England's unique success in reconciling reverence for the past with a passionate zeal for progress and reform. Particularly was he attracted by the spirit of individual enterprise and personal effort which seemed to him peculiarly characteristic of the English society of that day (1855). Not less, however, did he approve the public spirit of the English citizen. 'The public business of England', he wrote, 'is the private business of every Englishman'. To him, as to other philosophical observers of that period, England seemed to afford the most perfect example in the modern world of a State in which liberty was combined with order. 'It is in proportion as these two qualities are combined that the merit and value of different governments are to be estimated. Of these I have no hesitation in saying England, since 1688, is the most perfect.' Thus wrote Lord John Russell. Similarly, Montalembert. 'No other form of government has ever given to man more opportunities of accomplishing all that is just and reasonable, or more facilities for avoiding error and for correcting it.'

At a time like the present, when the prophets of woe are abroad in the land, and when exaggerated apprehensions as to the future of England are frequently expressed, there can be no better corrective than to recall the dismal prophecies which have been uttered in the past. In the middle of the last century the question was very generally asked on the Continent—alike by our friends and our enemies—'What is to become of England?' In some quarters it was inspired by friendly anxiety, in others by unconcealed eagerness to see the downfall of the country which was equally a foe to despotism and to revolution, which in Montalembert's opinion stood alone in the world as an example of rational liberty and was the object of the secret envy of all its enemies. 'When', they say to themselves, 'shall the world get rid of this nightmare? Who will deliver us from this nest of obstinate aristocrats and hypocritical reformers? When shall we break down the pride of this obstinate people, who, defying the laws of

Montalembert's
*The Political
Future of
England*,
1856

revolutionary logic, have the audacity to believe at once in tradition and progress—who maintain royalty while they pretend to practise liberty, and escape from revolution without submitting to despotism’¹

To the question asked no less insistently three-quarters of a century ago than it is to-day, ‘Has England run its course?’², Montalembert’s answer was unequivocal

‘England is *not* on the eve of perishing she will not follow the example of the Continent, and the enemies of freedom of speech, freedom of the press, and *self-government*, both Socialists and Absolutists, will have to wait a long time before they see the day of her apostasy and her ruin’³

And again

‘It is impossible for any one ever so little acquainted with the political history of England not to smile at the futility of the grounds on which we hear periodically announced the near and inevitable ruin of this last asylum of modern liberty. Now it is a formidable meeting, where some speakers of more or less notoriety have held seditious language against the sovereign, then again it is a crash of broken windows in some aristocratic quarter of the town, now it is the tumultuous assemblage of a hundred thousand individuals, with accompaniments of shoutings, banners, and processions, then, again, it is the press teeming with seditious invectives against all the views and all the things supposed to be most honoured and revered by the British people. But they forget that all this is no novelty—that it has always been so since England has been free. Since she has accepted the inconveniences and distortions of liberty together with its inseparable and incomparable benefits all has passed and will pass like a shower or squall, which, however violent, does little or no permanent damage. But with all his affected modesty and with all these ugly appearances and alarming incidents, the Englishman is not a whit less persuaded that his country is the first country in the world, he does not say so until he is contradicted, but he believes it, and for doing so has some very good reasons, and it only rests with himself to make these reasons still better’³

¹ Montalembert, *op cit*, pp 3, 4

- *Ibid*, p 8

² *Ibid*, pp 29-30

Nor was Montalembert content with generalizations. He set forth the specific grounds of his 'better hope'. A Frenchman was naturally struck by the fact that England had never become 'the pedantic slave of logic'. Very striking, too, seemed to him 'the admirable mechanism by which the peerage opens its ranks and closes them again. The English peerage, while attracting to its ranks 'all the great notabilities of the nation' at the same time sends back into the mass of the nation all its collateral branches'. Nor was there any other country where a career was so completely open to talent, even if talent were handicapped by heterodoxy. Like others of his countrymen, he was also greatly impressed by the strength of the English squirearchy and by the humanitarian spirit of the aristocratic reformers, such as Lord Shaftesbury. One great danger only Montalembert perceived in the political and social structure of England—the 'increase of functionaries', and the 'deluge of officials'.

The
'grounds
of better
hope'

All this should be eminently reassuring to those who imagine that social unrest, the growth of bureaucracy, or pessimistic predictions are symptoms peculiar to their own day. Seventy years ago Montalembert was quick to discern similar phenomena, and, as we have seen, to estimate at their true value the fashionable jeremiads of the day.

Contemporary with Montalembert and incomparably greater as a political observer was Alexis de Tocqueville, but though a sincere admirer of English institutions, and married to an English wife, Tocqueville never published any formal treatise upon English Government. His observations thereon, though pregnant, were casual and infrequent.

Far otherwise was it with the eminent German jurist Rudolf von Gneist. Gneist—one of the pioneers of the science of Comparative Jurisprudence—was principally concerned, alike as academic teacher and politician, with the contrast between Germany and England. In his *Trial by Jury* (1849) he entered a powerful plea for the more extended application to his own country of an insti-

Rudolf
von
Gneist,
1816-95

tution which in origin was common to both peoples. The main purpose of his life was, indeed, to make English institutions better known and more widely appreciated in Germany, and to lead the German people along the path of constitutional evolution so wisely and so profitably, as it seemed to him, trodden in England. Of his many works dealing with English Government the best known are the *History of the English Constitution* (translated (1886) from his *Englische Verfassungsgeschichte* (1882)), and *The English Parliament* (translated in 1886 from *Das englische Parlament* ¹), but Gneist had previously written widely on English self-government and on English Administrative Law. The author's purpose was throughout twofold: to enlighten and rouse to emulation his own countrymen and to publish work which would be accepted by English scholars as genuine contributions to original research. That the latter purpose was achieved more completely than the former is rather a matter of congratulation to Englishmen than of reproach to Germans. Gneist himself confessed that an attempt to imitate foreign models induced 'the conviction that the institutions of foreign countries cannot be adopted without modification' ².

From the other side of the Rhine there came an echo to Gneist in the works of the Comte de Franqueville, ³ and, somewhat later, of Émile Boutmy ⁴. Boutmy is an admirable commentator on English institutions, at once erudite and vivacious. That he should neglect a point here and over-emphasize a feature there is only to be expected from a foreigner who attempts the difficult task of analysing a Constitution so elusive as our own. But the instances of misplaced emphasis are wonderfully few, while the advantages of seeing English institutions through the eyes of

¹ Berlin, 1886.

² *English Parliament*, p. 21.

³ Cte de Franqueville, *Les Institutions politiques, judiciaires et administratives de l'Angleterre* (1863), *Le Gouvernement et le Parlement Britanniques* (1887).

⁴ *Développement de la Constitution et de la société politique en Angleterre* (1887), *Essai d'une psychologie politique du peuple anglais au XIX^e siècle* (1901), *Études de droit constitutionnel France-Angleterre-États Unis* (1903).

a French publicist, at once singularly competent and unusually sympathetic, are immeasurable

Dr Joseph Redlich of Vienna and M Ostrogorski are in a somewhat different category from the commentators named above. Their works are in the nature of monographs. To the Austrian scholar it was left to accomplish a piece of work which, as Sir Courtenay Ilbert justly observed, ought to have been undertaken long before by some competent Englishman. With what painstaking thoroughness Dr Redlich traced the growth of Parliamentary Procedure, and with what accuracy he analysed existing Procedure, has been indicated in preceding chapters.¹ Reference has also been made to M Ostrogorski's great work on *Democracy and the Organisation of Political Parties*.² That work, as Lord Bryce, when introducing it, pointed out, is both scientific in method and philosophical in spirit. Moreover, it filled a very conspicuous gap in political literature. The machinery of Party Government had not previously been treated on an adequate scale, if indeed it had been treated comprehensively at all.

Dr Redlich and M Ostrogorski are, however, specialists. Dr Laurence Lowell surveyed the whole field of English Government, Dr Woodrow Wilson touched it only incidentally in *Congressional Government*,³ and sketched it in outline in *The State*.⁴ American publicists cannot, of course, be regarded as foreigners in the domain of English letters, but both Dr Lowell and Dr Wilson were able to survey the working of the Parliamentary type of Democracy with a detachment denied to an Englishman. The result in both cases is eminently gratifying to English susceptibilities. It may, indeed, be doubted whether any Englishman has ever produced a more comprehensive, and in the main a more appreciative, survey of the political system of this country than Dr Laurence Lowell.⁵

¹ *The Procedure of the House of Commons: A Study of its History and Present Form*, 3 vols., London, 1908.

² London, 1907.

³ *Congressional Government—a Study in American Politics*, 1885.

⁴ *The State Elements of Historical and Practical Politics*, 1889.

⁵ *The Government of England*, 2 vols., 1st ed., 1908.

Dr Wilson and Dr Lowell also rendered invaluable service to the comparative study of Political Institutions ¹ That subject, as already indicated, has attracted far less attention in England than in the United States or Germany The truth is that the English people are not politically introspective, political analysis and speculation is less attractive to them than active participation in public affairs, and as to the details of foreign Constitutions and the manner in which their neighbours conduct their public business, they have hitherto been singularly incurious Indications multiply, however, that in this, as in other spheres, the attitude of aloofness is tending to weaken

Recent
work in
England

A group of great scholars have done much, in the last forty years, to remove the reproach so long, and so justly, levelled at English scholarship ²

Sir Henry
Maine,
1822-88

Of these the first in time and not the least in distinction was Sir Henry Sumner Maine (1822-88) With Maine's earlier work in the *History of Law and Institutions* I am not here concerned, but his book on *Popular Government* ³ is in the present connexion important Maine was perhaps the first among English publicists to reflect a real reaction against the genial optimism of Bagehot Bagehot never sought to conceal his conviction that, on the whole, everything in England was for the best in the best of all possible Constitutions Two Reform Acts—each of much larger scope than the Act of 1832—intervened between the first publication of *The English Constitution* and *Popular Government*, and Maine's tone as to the future of Democracy in general and of English Democracy in particular was far less confident than Bagehot's His was a refined and sensitive spirit, and there was much in the politics of a democratic

¹ Wilson, more particularly in *The State*, Dr Lowell in his admirable work, frequently referred to in preceding chapters, *Governments and Parties in Continental Europe*, 1st ed., 1896

² Here, as throughout this catalogic summary, I omit all mention of the great text-books of Constitutional History and Law, though no one who has read this book will imagine that I undervalue the work of historians like Hallam, Stubbs, Erskine May, and Mitland, or of jurists like Anson But my concern here is not with historians or with legal treatises, but with commentaries

³ London, 1885

regime which repelled him. The Council Chamber at Calcutta was more to his taste than either Westminster or Whitehall. The three criteria of a successful form of Government appeared to him to be its ability to preserve the national existence, to secure national greatness and dignity, and to enforce respect for law^{1, 2}.

The political outlook in England in 1884-5 frankly disquieted Maine. The foundations upon which the democratic polity rested looked to him very fragile. The two dominant sentiments in the political life of England—Radicalism and Imperialism—seemed to him mutually incompatible. Moreover, he discerned the growth within the body-politic of various associations irreconcilable with the ethos if not with the existence of the supreme Association—the State. He mistrusted, too, the influence of the party wire-puller whose power, evidently increasing with the growing organization of democracy, seemed to rest on the deep-seated instinct of the English people to 'take sides'—an instinct we have already noted in connexion with the development of parties. Again, Democracy seemed to be essentially opposed to Science and a fatal impediment in the path of Liberalism and progress.

'Let any [competently instructed person] turn over in his mind the great epochs of scientific invention and social change during the last two centuries, and consider what would have occurred if universal suffrage had been established in any one of them. Universal suffrage, which to-day excludes Free Trade from the United States, would certainly have prohibited the spinning jenny and the power loom. It would certainly

¹ *Popular Government*, pp. 61 seq.

I have hesitated whether or not to include in this 'group' the name of Henry Sidgwick (1838-1900). If I have not done so it is not because I fail to acknowledge my debt to his *Elements of Politics* (1891) and his *Development of the European Polity*, posthumously published in 1903. Quite otherwise. But I am anxious that the brief summary attempted in this chapter should not be regarded as exhaustive, even as a catalogue. Moreover, Sidgwick must, I suppose, be reckoned primarily as an ethical philosopher. His *Politics*, though a lucid and orderly summary, is mainly abstract in treatment. It is lacking in historical background, and does not, as it seems to me, contribute anything pertinent to the purpose of the present chapter. References to his work and to Seeley's *Political Science* will, however, be found in preceding chapters.

have forbidden the threshing machine. It would have prevented the adoption of the Georgian Calendar ; and it would have restored the Stuarts. . . . Even in our own day vaccination is in the utmost danger, and we may say generally that the gradual establishment of the masses in power is of the blackest omen for all legislation founded on scientific opinion, which requires tension of mind to understand it and self-denial to submit to it.' ¹

Two specific dangers he foresaw : tyranny and corruption. Was there no danger of a revival of the fiscal tyranny which once left people in doubt whether it was worth while preserving life by thrift and toil ? It makes not the smallest difference, as Maine observed, to the motives of the thrifty and industrious 'whether their fiscal oppressor be an Eastern despot or a feudal baron or a democratic legislature, and whether they are taxed for the benefit of a corporation called Society or for the advantage of an individual styled King or Lord'.² This danger did not exist in the United States, where 'Democracy' was purely a matter of politics and had not translated itself into economics ; in England it seemed to him imminent.

Tyranny would inevitably bring in its train two evils : corruption and slavery. The only practical alternative to economic competition is slavery. The former system has brought under cultivation the Northern States of the American Union : the latter was mainly responsible for the progress of the Southern States, as in the old days it produced the prosperity of Peru under the Incas. If corruption was to be apprehended it was the corruption not of titles and places but 'the directer process of legislating away the property of one class and transferring it to another.'³

W. E. H.
Lecty,
1838-
1903

In all this Maine was a true representative of the temper of mid-Victorian Liberalism, with its robust belief in self-help and *laissez faire*. But as the reign drew to a close many such men began to lose faith in the quasi-inspired character of the English Constitution, and to look with

¹ *Popular Government*, pp. 36, 98.

² *Ibid.*, p. 50

³ *Ibid.*, p. 106.

something of envy on the unquestionable rigidity and apparent stability of the American type of Democracy

Among these disillusioned Liberals was William Edward Hartpole Lecky (1838-1903). The tone of his last important work, *Democracy and Liberty* (1896), contrasts sharply with that of the books which first brought him fame—*History of Rationalism* (1865) and *History of European Morals* (1869). Lecky's mind was less exact than Maine's, his contribution to method was less original and his style far more discursive, but between the main argument of *Democracy and Liberty* and that of *Popular Government* there is a close resemblance. On the whole Lecky, like Maine, showed himself apprehensive as to the effect of Democracy upon Liberty, and upon the future of Parliamentary Government. He quoted with approval Sybil's generalization that universal suffrage has invariably meant the 'beginning of the end of all parliamentarism',¹ and shared to the full Aristotle's admiration for the political virtues of the middle class. Like Maine, Lecky discerned in the American Constitution elements of stability which seemed to be disappearing from our own, but though he dreaded the growth of class bribery and fiscal tyranny he nevertheless recognized the high standard of political integrity in Great Britain, and clung to the conviction that on great issues the judgement of the constituencies would seldom be wrong.²

Inferior as a thinker perhaps to Lecky, certainly to Maine, Dicey was superior to both as an expositor. It is indeed questionable whether any work in the language has done more to elucidate the fundamental principles of the English Polity than Dicey's *Law of the Constitution*, nor has any jurist ever exhibited a more complete confidence in its characteristic virtues. Yet it has been made clear in previous chapters that the tone of the last edition of that classical work (1915) was decidedly less confident than that of the first (1885). In particular, as we have seen, Dicey deplored the declining faith in the rule of law,

A V
Dicey,
1835-
1922

¹ *Democracy and Liberty*, I, p. 28

² *Ibid.*, I, pp. 114-201

the decreasing respect for law, and the weakening of the guarantees for personal liberty. Recent experience and recent research¹ have still further weakened the force of Dicey's too complaisant comparison between the 'rule of law' in England and the imperfect protection afforded to the subjects of those foreign States where the principles of Administrative Law prevail.

Nevertheless, Dicey, while sharing the anxiety which recent tendencies must excite in the minds of all thoughtful and patriotic Englishmen, was no untempered pessimist. 'Pessimism', as he justly observed, 'is as likely to mislead a contemporary critic as optimism.'

James,
Viscount
Bryce
1838-
1922

Lord Bryce, buoyant to the last under the weight of four-score years, never wavered in his democratic faith. He preserved till death the dew of his political youth. Less original as a jurist than Maine, Bryce was greater as a publicist than Lecky, and as an expositor not inferior to Dicey. His last and perhaps his greatest work, *Modern Democracies*, is remarkable not only for the profound erudition and the accumulated experience to which it testifies and of which it is the fruit, but even more for the sustained favour of its faith in popular government. Frankly admitting that less has been achieved by Democracy than the prophets of Democracy expected, he still maintained that the experiment has not failed, 'for the world is after all a better place than it was under other kinds of government, and the faith that it may be made better still survives'.² Yet, 'shaken out of that confident faith in progress which the achievements of scientific discovery had been fostering, mankind must resume its efforts towards improvement in a chastened mood'.³

Contem-
porary
Thought

'Chastened' is perhaps the most appropriate epithet for the mood which prevails among the publicists of to-day, if indeed it is possible to detect any prevalence among the shifting winds which have been blowing since the subsi-

¹ Cf. in particular, J. E. Robinson, *Public Authorities and Legal Liabilities*, London, 1925, and C. T. Carr, *Delegated Legislation*, Cambridge, 1923.

² *Op. cit.*, II 670.

³ *Ibid.*, p. 665.

dence of the tempest of war To indicate contemporary writers by name might be deemed invidious, but it is evident that mistrust of Parliamentary Democracy is common to two schools of thought, widely differing from each other in creed and in aim

There are those, on the one hand, who are, as we have seen, frankly mistrustful of the tendencies of popular government in general, but prefer the representative to any other type of Democracy On the other hand there are those who, while professing complete faith in Democracy, mistrust the forms which Democracy has assumed in England and in the United States To them Representative Government, particularly if it be based upon the principle of locality, is anathema, the highly centralized State, even if it is ultimately based upon popular election, seems to them to be in its essence hardly less tyrannical than that of feudal baron or autocratic monarch Like Rousseau they regard the citizens of a Parliamentary State as little better than slaves, they believe sovereignty to be not merely indivisible but inalienable, they would apply the principles of Economic Syndicalism to political organization, and would substitute the direct for the representative type of Democracy

As steps towards their ultimate end they would welcome the immediate introduction of such devices as the *Referendum*, the *Initiative*, and the *Recall*, and would substitute a system of Committees of the Legislature for the Cabinet form of Executive

The Cabinet system has, indeed, been exposed to a cross-fire of criticism One school of critics complains of the weakness of a Parliamentary Executive, another condemns the Cabinet system as unduly autocratic Can it survive this cross-fire? German critics have particularly insisted upon the transitory character of Parliamentary Democracy They have pointed out that the English Cabinet system and Party system were products of eighteenth-century oligarchy and have predicted that they would not survive the advent of Democracy It is indeed

Is
Cabinet
Govern-
ment
compa-
tible with
Demo-
cracy

undeniable that modern developments have greatly altered the conditions of Parliamentary Government, and, in particular, tend to impose a severe strain on the Cabinet. Such a strain exposes the system to many risks: the risk of an overgrown Cabinet delegating its functions to an inner body, the risk of insufficient central supervision over departmental work, of insufficient co-operation between the great departmental chiefs in the general work of government.¹

The force of such criticism cannot be denied, and two further admissions may be made and emphasized. It goes without saying that the Cabinet system is incompatible with Presidential Democracy, and I find it difficult to believe that it would be found consistent with Referendal Democracy of the Swiss type, still less with the Direct Democracy which some desire. A Cabinet Executive is essentially a product of the Parliamentary type of Democracy. It is the crown and glory of that system, it has grown with its growth and strengthened with its strength. Should that system perish, or in essentials be impaired, the Cabinet system may be expected to decay or perish with it.

Is Representative
Government
compatible with
Democracy?

A more fundamental question must, however, be faced. Is Representative Government compatible with the spirit of 'real' Democracy? The Swiss publicists, as we have seen, hold that it is not. There are even English publicists who, approaching the problem from different angles, concur in the conclusion that some modification of the existing distribution of authority is inevitable. On the one hand they argue with indubitable cogency that the increase in the business of government is laying upon the Parliamentary Executive a burden which no Cabinet can sustain. The inevitable result is that the Political Heads of Departments must become increasingly dependent upon their permanent officials. On the other hand the critics express the fear lest the Legislative body, becoming increasingly dependent upon the Executive, will 'more and

¹ Ilbert, *op. cit.*, p. xv.

more atrophy, until it ceases to attract to its benches the men who want to work, and earns more and more the contempt of the nation ' ¹ It is undeniable that a good deal of the power, knowledge, and experience that are still to be found in Parliament are now running to waste, and that no adequate means of stopping the waste have yet been devised. The author just quoted recommends that a series of small Select Committees, corresponding, as such Committees invariably do, to the distribution of parties in the House, should be set up in connexion with each of the great Departments of State—particularly with a view to supervising and checking expenditure.

To this and similar suggestions reference has been already made. The experience of the Estimates Committee has proved that it is not in practice so easy as outside critics suppose to draw the line between ' policy ' and administrative detail. But if this line be not drawn and rigidly respected, what becomes of Cabinet and Ministerial responsibility? Successive Governments have hitherto looked with jealousy and suspicion upon any real approximation to the Committee system. It may well be that their instinct is sound, that any devolution of real power upon Parliamentary Committees would gradually undermine Cabinet autocracy, and might even impair Cabinet responsibility. But although instinctively alive to this danger, is not the political hierarchy blind to a greater, if less obvious, danger? Jealous of the encroachments of Parliament, may it not be compelled, by mere stress of circumstances, to submit (however unconsciously) to the dictation of the Bureaucracy?

Be that as it may, it is evident that there exists a certain section of political opinion which is dissatisfied with the existing distribution of power. Familiar with the methods which have given to local representative bodies a real (if a diminishing) control over local officials, they will undoubtedly insist upon the trial of a similar experiment, though perhaps in modified form, in the Central Govern-

¹ R. Mun, *Powers and Bureaucrats*, p. 94.

ment Whether the State and the Empire would survive the experiment is a question on which opinions differ and which it would be futile to pursue

Parliamentary Government means, however, something more than the responsibility of the Executive to the Legislature It means that the Legislature itself should represent the electorate But, as the Swiss jurists very properly contend, Representative Government is one thing, Democracy (meaning thereby Direct Democracy) is another

Are the root principles of the two incompatible? Theoretically they are Representative Government, as understood and worked out in England, rests fundamentally upon the doctrine of Parliamentary Sovereignty The root principle of Democracy is the Sovereignty of the People

The English genius for compromise has to some extent evaded the dilemma by distinguishing between 'legal' sovereignty which is vested in Parliament, and 'political' sovereignty which is exercised by the electorate But a significant question remains Is the machinery at the command of the political sovereign adequate? There are those who argue that it is not, and that to render it effective recourse should be had to such devices as the Referendum, the Initiative, the Mandate, and the Recall¹ These devices have received some attention in preceding chapters Reference is here made to them only in illustration of contemporary movements of opinion, and of the criticisms to which Parliamentary Democracy is now exposed

Conclu-
sions?

The main purpose of this work has been expository and analytical, there has been no attempt to maintain a thesis or to emphasize conclusions Yet certain conclusions would seem, unbidden, to have emerged Parliamentary Government is, in essence, a compromise, combining, by

¹ Cf e g E T Powell, *The Essentials of Self-Government*, London,

means of a singularly ingenious, original, and effective device—a device which was itself the product of undesignated if not wholly accidental evolution—the best features of Monarchy, Aristocracy, and Democracy. The core, centre, and crown of Parliamentary Government is the Cabinet—an Executive directly responsible to the Legislature, and through the Legislature, of which it forms part, respondent to the wishes of the electorate.

In a Constitution so flexible as our own, modifications in machinery are inevitable, but it is essential to make sure that the modifications shall tend to strengthen and not to impair the ethos of the Constitution. Proposals, in themselves innocuous and even attractive, may nevertheless tend in a direction contrary to the inner spirit of our institutions. An amiable intention may well consist, in politics, with a dangerous and indeed destructive programme. Leadership may sometimes involve the blind-folding of followers, but that the leaders themselves should be uncertain of the goal towards which they are moving can only bring disaster upon the Commonwealth.

If then it be deemed desirable to abandon the essentials of Parliamentary Democracy, it is imperative that the abandonment should be deliberate, and that those who favour and counsel a change should be clear themselves as to the alternative they recommend and make it clear to others.

The argument has been repeatedly advanced in the present work that, as things now are, and putting aside autocracy as a merely temporary expedient, the only practicable alternatives to Parliamentary Democracy today are either the Presidential system, as best exemplified in the United States of America, or Referendal Democracy as evolved in the Swiss Confederation. It might well be that were the English Constitution federalized, either in reference to the United Kingdom or to the British Commonwealth of Nations, the Cabinet system would have to be modified in the American direction. On the other hand, it is possible that the pressure of economic syndicalism

The Alternatives?

may be reflected in a demand for more direct democratic control in the sphere of Government. Arguments, cogent if not conclusive, may be advanced in favour of a move in either of these directions.

Political
Syndical-
ism

The immediate and insidious danger would seem to lie in an unperceived and half-unconscious approximation towards one or other of these systems. One such approximation was unquestionably arrested by the abrupt restoration of the Cabinet system in 1919. The summer and autumn of 1920 witnessed, on the other hand, an unmistakable movement towards political syndicalism—a movement which suffered a severe check in April 1921.

In April 1921 the country found itself confronted by a demand which, if conceded, would have transferred the control of the government from the King-in-Parliament to a Triple Alliance of the Miners, Railwaymen, and Transport-workers.¹ The Miners were called out on 1 April, and the executives of the Railwaymen and the Transport-workers proclaimed a sympathetic strike to begin on Friday, 15 April. 'Direct action' was to be employed with the avowed object of overthrowing the existing Constitution and substituting therefor a Government based upon the principles of political and industrial syndicalism.

The Government of the day met the crisis with firmness, a large meeting of private members of the House of Commons held at the eleventh hour, on the evening of Thursday, 14 April, discovered a formula which seemed to afford a basis for further negotiation with the Miners,² on Friday, 15 April, a rift appeared in the ranks of the Triple Alliance, the General Strike was called off less than six hours before it was due to begin, and the threatened revolution collapsed. 15 April 1921 is still designated in

¹ The evidence for this statement is well summarized by Professor Hearnshaw, *Democracy and Labour*, c. 1 and *passim*.

² There were in fact two meetings held at the House of Commons on that day: one to hear a deputation from the mine-owners, the second to hear representatives of the miners. At both meetings the present writer presided.

extreme-Socialist literature as 'Black Friday'. As a fact it marked an escape not only for the community, but more particularly for that section of it which lives by manual labour. The incident is here cited only in illustration of the danger to be apprehended from the unperceived and half-unconscious tendencies which lurk in the movement towards political syndicalism. The essence of that movement is mistrust of the principle of Representation, and a desire to replace Parliamentary Democracy by a decentralized State, controlled by syndicalized industries.

At the close of a lengthy treatise devoted to the analysis of machinery one reflection almost inevitably obtrudes itself. If systems of Government are more important than Pope's cynical aphorism would suggest, if machinery matters much, it is men nevertheless who must work machinery, it is the individual citizen who can make or mar the best system of government ever devised by the wit of man. To that commonplace conclusion every philosopher who has given thought to problems of government has been inexorably driven. 'Men, not measures' was a delusive and perhaps dishonest cry in the mouths of those who in the eighteenth century sought to break down the party system, but man nevertheless remains the raw material out of which the State must be built.

Men,
Citizens,
and
States

'The worth of a State, in the long run, is the worth of the individuals composing it, and a State which postpones the interests of *their* mental expansion and elevation, to a little more of administrative skill, or of that semblance of it which practice gives, in the details of business, a State which dwarfs its men, in order that there may be more docile instruments in its hands even for beneficial purposes, will find that with small men no great things can really be accomplished, and that the perfection of machinery to which it has sacrificed everything, will in the end avail it nothing for want of the vital power which, in order that the machine may run more smoothly, it has preferred to banish.'¹

So runs the concluding passage in Mill's noble essay *On*

¹ *On Liberty*, p. 207

Liberty Adam Smith reached the same truth from a different angle when he wrote 'Upon the power which the leading men, the natural aristocracy of every country, have of preserving or defending their respective importance, depends the stability and duration of every system of free Government' ¹

This is true of every State, it is especially true of Democracies, it is above all true of a State governed under a democratic Constitution so flexible, so largely dependent for its successful working upon convention, custom, and understandings, as our own

The Edu-
cation of
the
Citizen

How then may we hope to secure a due succession of fit persons well qualified for the service of God in Church and State? We can only look, as Aristotle looked, to a system of education devised to that end 'A great Empire and little minds', as Burke reminded us, 'go ill together' ² Magnanimity—in the true sense—is the real end of education

The
Sprit of
the
Polity

On what lines should the education, designed to effect this object, be planned? Evidently, education (again to quote Burke) does not consist in reading 'a parcel of books' 'No Restraint of discipline, emulation, examples of virtues and of justice, form the education of the world.' ³ Aristotle is more definite than Burke, and his precepts could hardly be bettered. The prime aim of education is, as he insisted, political, the educational system should be designed with the supreme object of preserving the State in its integrity and purity by forming in its citizens a particular type of character

'That which most contributes to the permanence of the Polity is the adaptation of education to the form of government. The best laws, though sanctioned by every citizen of the State, will be of no avail unless the young are trained by habit and education in the spirit of the Polity. The citizen should be moulded to suit the form of government under which he lives' ⁴

¹ *Wealth of Nations*, Bk. IV, c. 7

² *Speech on Conciliation with America* (*Works*, III, 126)

³ *Works*, VI, 268

⁴ *Politics*, V, 9, and VIII *passim*

The world is well aware with what thoroughness this principle was assimilated in Imperial Germany, and with what skill it was applied in their educational system. No other modern State has, indeed, shown itself more deferential to the precept of Aristotle, with the result that there was a coherence and consistency in the political life of Germany such as could not be found elsewhere. In unique measure Imperial Germany succeeded in bringing her scheme of education into relation with the spirit of the Polity.

Has England been less observant of the Aristotelian precept? It is true that to the German precision the English educational system appears to be disorderly, incoherent, anomalous, even chaotic. But so does the English system of government—so does the loose and apparently haphazard connexion between the motherland and the Dominions and Dependencies. Yet the Ordeal by Battle proved, as three centuries of Empire-building have proved, that the education of English youth has, with all its faults and irregularities, been happily conceived in the 'Spirit of the Polity'. The English Polity is infused with a twofold spirit—that of Liberty and that of Individuality. Anything which tends to the repression of individuality or to the enforcement of a drab uniformity is, therefore, alien to the true spirit of the English Polity.

A second precept in Aristotle's educational theory is not less important than the first. Character rather than knowledge is the true end and criterion of education; it is the will, even more than the intellect, which must be trained and developed. To this test also English education has satisfactorily reacted. The educational tree has been known by its fruits. Shortcomings have indeed been revealed; recent events have shown us to be lacking in technical knowledge, slow to apply science to the exigencies of industry and war, extraordinarily devoid of the foresight which is the product of the scientific spirit. Yet we are proud to believe that, when subjected to the supreme test, character told more heavily than technical

Character-forming

skill, and that in qualities of will English manhood and womanhood were found not to be deficient

Body-
building

In Aristotle's scheme of education there was, however, a third element. It was to be not only moral and political, but physical. Of the claims of ἡ γυμναστική German education was not unmindful. Physical training was there marked by the same scientific precision which distinguished the training of the intellect. In England, on the other hand, ἡ γυμναστική is pursued in a fashion apparently haphazard and unorganized. We have preferred, half-unconsciously perhaps, character-forming to scientific muscular development. Gymnastics have been relatively neglected in comparison with 'games', and games have been encouraged as much for their moral as for their physical value. Yet here again we have perhaps builded better than we knew. To 'play the game' has been held up as the ideal of political as of social life, to learn to give and take, to obey and to command, to subordinate the interests of the individual to those of the 'side'—these are the lessons which it is the special function of games to inculcate, and these we flatter ourselves that Englishmen have learnt.

Finally, Aristotle held that technical training, whether of the body, the hand, or the intellect, should never be exalted to a primary place in the curriculum, but that the teaching of special crafts and particular professions should be kept in due subordination to the idea of a liberal and humane education.

English education would seem, on the whole, to react successfully to the exacting tests imposed by Aristotle. The system is broadly conceived, less of set purpose than by happy accident, in the spirit of the Polity. Technical skill is undoubtedly a great matter, and may by no means be neglected. The citizen who is not master of some craft lacks the power to make an essential contribution to the life of the Commonwealth. Man does not live by bread alone, but he cannot live without it, reasonable abundance of wealth—in the true sense of the word—is a basic

condition of national as of personal well-being and self-respect. Yet the body is more than raiment ; good citizenship is even more important than high craftsmanship. As a member of a democratic community the individual citizen must not only toil to preserve the material existence of the State, he must take his share in government ; he must in turn rule and be ruled. Hence his education must be devised to achieve a twofold object : to enable him to gain a livelihood ; and, still more, to equip him for life—the life of the citizen ruler of a world-empire.

That individual effort may not be misdirected ; that every unit of energy expended by man may receive its appropriate compensation ; that the co-operative effort of good citizens may achieve its purpose in the well-being of the Commonwealth—this is the object and this the justification of all machinery. Tools are less important than the men who handle them ; yet it is by the perfecting of tools that man has travelled so far from that state of nature in which life was ' nasty, brutish, and short '. A mechanism, perfect in every detail, is essential to perfection alike in the individual and in the State.

APPENDICES

FORM OF SUMMONS TO A MEETING OF THE CABINET

*A Meeting of His Majesty's
Servants will be held at 10, Downing
Street. at o'clock on
the
which
is desired to attend.*

10, Downing Street

APPENDIX B

ORDERS IN COUNCIL

THESE Orders are of various types the following documents are illustrative of several of them

(a) Delegated Legislation

THE Order in Council (25th March 1920) for restrictions upon aliens is in itself an elaborate piece of legislation, of which only an outline can here be given

ALIENS

ORDER IN COUNCIL MADE UNDER THE ALIENS RESTRICTION ACTS, 1914 AND 1919

ARRANGEMENT OF ARTICLES

PART I

ADMISSION OF ALIENS

Article

- 1 Restrictions on landing of aliens
- 2 Approved ports
- 3 Inspection and detention of aliens
- 4 Saving for transients, &c
- 5 Returns as to aliens by masters of ships

PART II

SUPERVISION AND DEPORTATION OF ALIENS

- 6 Obligation on aliens to register
- 6A Non-resident alien seamen
- 7 Hotel-keepers and others to furnish particulars
- 8 Registration authorities and officers
- 9 Protected areas
- 10 Power to close clubs and restaurants
- 11 Power to impose special restrictions on aliens
- 12 Deportation of aliens
- 13 Expenses of deportation

GENERAL

- 14 Powers to grant exemptions
- 15 Requirements as to documents of identity and supply of information
- 16 Appointment of officers
- 17 Powers to make rules
- 18 Offences and penalties
- 19 Powers to arrest without warrant
- 20 Interpretation
- 21 Retention of nationality, &c
- 22 Saving for diplomatic persons, &c
- 23 Application to Scotland and Ireland
- 24 Amending orders
- 25 Date of repeal of Aliens Act, 1905
- 26 Short title and revocation

SCHEDULES

AT THE COURT AT BUCKINGHAM PALACE

The 25th day of March 1920

PRIS N1,

THE KING'S MOST EXCELLENT MAJESTY
IN COUNCIL

WHEREAS by the Aliens Restriction Act, 1914 (in this Order called the Principal Act), His Majesty was empowered at any time when a state of war might exist between His Majesty and any foreign power, or when it appeared that an occasion of imminent national danger or great emergency had arisen, by Order in Council to impose restrictions on aliens 4 & 5
Geo 5
c 12

And whereas in pursuance of the powers conferred by the Principal Act His Majesty in Council has been pleased by the Aliens Order, 1919, to impose certain restrictions on aliens 1919, No
1077

And whereas it is provided by the Principal Act that His Majesty may by Order in Council revoke or add to any Order in Council made thereunder 9 & 10
Geo 5
c 92

And whereas it is desirable that the provisions of the said Aliens Order, 1919, should be amended in certain particulars

and as so amended should continue in force together with certain provisions of the Aliens Act, 1905, after the termination of the present war, and that a date may be fixed for the repeal of the Aliens Act, 1905

NOW, THEREFORE, His Majesty is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows

[Here follow (pp 4-20) the 26 clauses, with many sub-clauses and 3 schedules enumerated above]

(b) Taxation

The Order of 6th February 1925 affords relief in respect of Colonial Excess Profits Duty

AT THE COURT AT BUCKINGHAM PALACE

The 6th day of February 1925

PRESENT,

THE KING'S MOST EXCELLENT MAJESTY
IN COUNCIL

WHEREAS by Section 23, Sub-section (1) of the Finance Act, 1917, it is provided that His Majesty may, by Order in Council, declare

- (a) that, under the law in force in any of His Majesty's possessions, excess profits duty is chargeable in respect of any profits in respect of which excess profits duty is also payable in the United Kingdom, and
- (b) that arrangements have been made with the Government of any such possession whereby, in respect of any profits, only the duty which is higher in amount is to be payable, and the amount of such duty is to be apportioned between the respective Exchequers in proportion to the amount of duty which would otherwise have been payable in the United Kingdom, and in that possession respectively

AND WHEREAS by virtue of the provisions of Article 2 of the Excess Profits Duty Ordinance, 1919 (Ordinance No XXIV of 1919), of the Island of Malta, it was provided that there should

ORDERS IN COUNCIL

513

be charged, levied and paid on the aggregate amount by which the profits (hereinafter called 'excess profits') arising each year from any trade or business to which that Ordinance applied, in the period between the 4th day of August, 1914, and the 31st day of July, 1919, exceeded, by more than one hundred pounds the pre-war standard of profits as defined for the purposes of that Ordinance, a duty (in that Ordinance referred to as 'excess profits duty') at the rates therein set forth

AND WHEREAS by virtue of the provisions of Article 3 of the said Ordinance, it was further provided that a duty at the rates set forth in Article 2 of the said Ordinance should be charged, levied and paid on profits (hereinafter included under the name of 'excess profits') arising from newly started trades or businesses during or within the period established in the said Article 2, provided that such rates be chargeable on profits made in excess of a margin of ten per cent per annum on the capital

AND WHEREAS the Island of Malta is one of His Majesty's possessions

NOW, THEREFORE, His Majesty, by virtue and in exercise of the powers in this behalf by the Finance Act, 1917, or otherwise in His Majesty vested, is pleased by and with the advice of His Privy Council, to order, and it is hereby ordered and declared that under the law in force in the Island of Malta excess profits duty was chargeable for the period between the 4th day of August 1914, and the 31st day of July 1919, in respect of profits in respect of which excess profits duty was also payable in Great Britain and Northern Ireland, and that arrangements have been made with the Government of the Island of Malta whereby in respect of any such profits only the duty which is higher in amount is to be payable and that the amount of such duty is to be apportioned between the respective Exchequers in proportion to the amount of duty which would otherwise have been payable in Great Britain and Northern Ireland or in the Island of Malta respectively

And the Right Honourable Leopold Charles Maurice Stennett Amery, His Majesty's Principal Secretary of State for the Colonies, is to give the necessary directions herein accordingly

M P A Hankey

APPENDIX B

(c) *A purely administrative Order
Military Manœuvres*

AT THE COURT AT BUCKINGHAM PALACE

The 25th day of June 1925

PRESENT,

THE KING'S MOST EXCELLENT MAJESTY
IN COUNCIL

WHEREAS by the Military Manœuvres Acts, 1897 and 1911, it is enacted that His Majesty may, by Order in Council, authorize the execution of military manœuvres within specified limits during a specified period not exceeding three months

NOW, THEREFORE, His Majesty, by and with the advice of His Privy Council, by virtue of the power for this purpose given to His Majesty by the said Act, and of every other power hereunto enabling, His Majesty doth hereby authorize the execution of military manœuvres within the limits specified in the Schedule to this Order during the period of three calendar months, commencing from the 15th day of July 1925

AND the Right Honourable the Principal Secretary of State for the War Department is to give the necessary directions herein accordingly

M P A Hankey

(d) *An Order giving effect to the Report of the
Judicial Committee of the Privy Council or
an appeal from an Indian Court*

AT THE COURT AT BUCKINGHAM PALACE

The 25th day of June 1925

PRESENT,

THE KING'S MOST EXCELLENT MAJESTY

His Royal Highness the Duke of York

Lord President

Lord Steward

Lord Privy Seal

Secretary Sir Samuel Hoare

Colonel W G Nicholson

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 15th day of June 1925 in the words following, viz

' WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee the matter of an Appeal from the High Court of Judicature at Fort William in Bengal

' THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the Appeal and humble Petition into consideration and having heard Counsel on behalf of the parties on both sides Their Lordships do this day agree humbly to report to Your Majesty as their opinion that this Appeal ought to be allowed the Decree of the High Court of Judicature at Fort William in Bengal in its Appellate Jurisdiction dated the 5th day of January 1923 set aside with costs and the Decree of the said High Court in its Ordinary Original Civil Jurisdiction dated the 11th day of August 1922 restored '

' And in case Your Majesty should be pleased to approve of this Report then their Lordships do direct that there be paid by the Respondent to the Appellant her costs of this Appeal incurred in the said High Court and the sum of £161 7s 6d for her costs thereof taxed on the pauper scale incurred in England '

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed, obeyed, and carried into execution

Whereof the Judges of the High Court of Judicature at Fort William in Bengal for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly

M P A Hankey

(e)

The following Orders were (i) issued in pursuance of a special power conferred by the Representation of the People Acts, 1918-22, and (ii) in virtue of general powers conferred upon the Crown

(1) AT THE COURT AT BUCKINGHAM PALACE

The 25th day of June 1925

PRESENT,

THE KING'S MOST EXCELLENT MAJESTY
IN COUNCIL

WHEREAS by the Representation of the People Acts, 1918 to 1922, power is conferred on His Majesty to make provision for various matters by Order in Council

AND WHEREAS by the Representation of the People Order, His Majesty was pleased by Order in Council to make provision for various matters under those Acts

AND WHEREAS by Section 40 (2) of the Representation of the People Act, 1918, any Order in Council made thereunder may be revoked or varied as occasion requires by any subsequent Order in Council

NOW, THEREFORE, His Majesty, in pursuance of the powers conferred upon Him by those Acts, and of all other powers enabling Him in that behalf, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows

The Representation of the People Order shall be amended as follows

The following Rule shall be substituted for Rule 9

Continu-
ance of
names on
absent
voters
list

'9 Where the name of any person has been placed on the absent voters list in pursuance of a claim in that behalf by reason that the nature of his occupation, service or employment was such that he might be debarred from voting at a poll, his name shall be placed on the absent voters list for each subsequent register, so long as he continues to be registered for the same qualifying premises and the registra-

ORDERS IN COUNCIL

517

tion officer is satisfied that he continues in such occupation, service or employment as aforesaid, unless he gives notice in writing to the registration officer that he does not wish his name to be placed on the list '.

M P 1 Hankey

(11) AT THE COURT AT BUCKINGHAM PALACE

The 24th day of July 1925

PRESENT,

THE KING'S MOST EXCELLENT MAJESTY

Lord President	Chancellor of the Duchy of
Duke of Atholl	Lancaster
Earl of Crawford and	Hon Sir Ronald Lindsay
Balcarras	

WHEREAS by treaty, capitulation, grant, usage, sufferance and other lawful means His Majesty has power and jurisdiction within Palestine

AND WHEREAS it is desirable to regulate the grant and acquisition of Palestinian citizenship

NOW, THEREFORE, His Majesty, by virtue and in exercise of the powers in this behalf by the Foreign Jurisdiction Act, 1890, or otherwise, in His Majesty vested, is pleased by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows

[There follow (pp 1-8) detailed regulations as to Palestinian citizenship]

A distinction in the *form* of the *Orders* will be noted as between those which do and those which do not indicate the presence of the Sovereign and the names of the Councillors present. The distinction appears to be merely one of convention. When the Order operates outside the United Kingdom the names of those present are included, in Orders operating only within the United Kingdom they are omitted.

APPENDIX C

PROVISIONAL AND OTHER STATUTORY ORDERS AND RULES

REFERENCE has been made in the text of this work (cf especially Chapter XXX) to the tendency on the part of Parliament to confer upon the Administrative Departments quasi-legislative powers

Administrative Orders

Many of the Orders issued by Government Departments are purely Administrative (such as most of those for the Army) and require no sanction from Parliament. Such is the following Order issued by the Ministry of Health

(4th July 1925)

Public Health Acts Amendment Act, 1907

Confirming order under section 51

BOROUGH OF GRAVESEND

WHEREAS in pursuance of the powers conferred by section 112 of the Public Health Act, 1875, as amended by section 51 of the Public Health Acts Amendment Act, 1907 (which last-mentioned section is in force in the Borough of Gravesend by virtue of an order made by the Local Government Board and dated the 5th day of December 1908), the Mayor, Aldermen and Burgesses of the Borough of Gravesend acting by the council, have made the order (hereinafter referred to as 'the Council's order') set forth in the Schedule to this order

NOW THEREFORE, the Minister of Health, in the exercise of his powers in that behalf, hereby orders and directs as follows

1 The Council's order is hereby confirmed

2 The Council shall forthwith cause a statement of the effect of this order, and of the place where a copy may be inspected, to be published once at least in some newspaper circulating in the Borough, and in the *London Gazette*

3 This order may be cited as the Borough of Gravesend (Offensive Trades) Confirmation Order, 1925, and shall come into operation on the 27th day of July 1925

Other Orders are quasi-legislative and in varying degrees require the sanction of Parliament

- (i) Some Orders require only to be laid on the table of each House,
- (ii) In some cases the Authority is prohibited from taking any action under the rule for a prescribed period after laying,
- (iii) In others—*Draft Orders*—the Order cannot be made until both Houses have agreed to it, with or without modification, by resolution,
- (iv) Other Orders come into effect from the date fixed by the Order, but may be annulled, wholly or in part, by a resolution of or address from either House

Since 1890 a volume of Statutory Rules and Orders, containing all Orders of a public and general character, has been annually published by Authority

Provisional Orders

Provisional Orders are completely subject to Parliamentary control, and must indeed be regarded as a simplified method of Private Bill legislation. They proceed from a Government Department (or in some instances a local authority), either on its own initiative or, more often, upon the application of parties interested, and are, from time to time, collected in a Confirming Bill by the Department concerned and submitted to Parliament. The procedure differs from that on a Private Bill only in that the Department takes the place of Parliament in the initial stages in protecting interested parties, &c.

The Departments now empowered to make Provisional Orders are the Ministries of Health, Labour, Agriculture, and Transport, the Boards of Trade and Education, the Post Office, the Home Office, and the Secretary of State for Scotland, with the Departments over which he presides.

After the first reading (which must be taken before Whitsuntide) all Provisional Order Bills are referred to the Examiners of Private Bills, before whom compliance with Standing Orders

must be proved, and by whom such compliance must be certified or dispensed with. The Bill then proceeds in the manner prescribed for a Private Bill.

The following is a typical Confirmation Bill.

[16 GLO 5]

*Ministry of Health
Provisional Orders (No. 1)*

A

BILL

A D
1926

To confirm certain Provisional Orders of the Minister of Health relating to Barnsley Maidstone Port Talbot Rochester and Chatham Joint Sewerage District Wakefield and West Kent Main Sewerage District.

38 & 39
Act c 55

WHEREAS the Minister of Health has made the Provisional Orders set forth in the schedule hereto under the provisions of the Public Health Act 1875

And whereas it is requisite that the said Orders should be confirmed by Parliament.

Be it therefore enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same as follows

Orders in
schedule
con-
firmed

1 The Orders set out in the schedule hereto shall be and the same are hereby confirmed and all the provisions thereof shall have full validity and force.

Short
title

2 This Act may be cited as the Ministry of Health Provisional Orders Confirmation (No. 1) Act 1926.

[Thereon follow sixteen pages of schedules.]

APPENDIX D

FINANCIAL PROCEDURE (LEGISLATIVE)

THE financial procedure of the House of Commons is so complicated that it seems desirable to supplement the description in Chapter XX by a series of typical documents, illustrative of the financial system and procedure. By reference to these students will be able to follow the precise sequence of events in the financial year.

I

The ball is set rolling on or about 1st October by a circular addressed by the Treasury to the various Civil Departments requiring them forthwith to prepare and submit their Estimates of Expenditure for the coming year.

The procedure as regards the 'Fighting' Services is different. The totals for Army, Navy, and Air are generally settled in advance by discussion between the Ministers concerned and submitted for Cabinet approval. The aggregate total for each of these three Services having thus been settled, the detailed Estimates for the different votes are prepared in the Departments and the Treasury approve the detailed votes or heads for the Fighting Services after a general scrutiny.

The terms of the Estimates Circular (which is not a published document) vary from year to year. The following is the Circular (abbreviated) issued on 1st October 1924 for the current financial year (1925-6).

(F 7827)

(No 21/24)

ESTIMATES CIRCULAR, 1925-6

Treasury Chambers,

1st October 1924

SIR,

THE Lords Commissioners of His Majesty's Treasury command me to transmit to you the enclosed forms of estimates for the services to be administered by your Department during the year ending 31st March 1926.

Two copies of each form, after insertion of the proper particulars, and with such changes as may be necessary, should be returned to the Treasury in due course.

The figures of the past year should be carefully checked, and corrected where necessary, in particular in respect of Supplementary Estimates included in the Appropriation Act.

APPENDIX D

NECESSITY FOR ECONOMY

My Lords find it necessary again to urge upon Departments the paramount importance of further reductions of public expenditure

ACCURATE ESTIMATING

To the Accounting Officer

Your particular attention is invited to the subject of the overestimating by Departments in recent years

At this stage of progress towards normal conditions a much closer approach to the standard of accuracy which obtained before the war can properly be required. You are accordingly requested to prepare your estimates with the utmost care, and to have especial regard to the comparison of outturn with estimate in recent years

The Estimate for should reach the Treasury not later than . If you anticipate difficulty in complying with this requirement you should communicate at once with the Estimate Clerk at the Treasury, explaining the circumstances likely to cause delay

To enable the Estimates to be issued promptly, it is important that as many questions of detail as possible should be settled before the Estimates are sent in. If in any case questions are still unavoidably outstanding, the Estimates should not on that account be delayed, but should be submitted to the Treasury in as complete a state as possible upon the basis of existing rates and authorities, with the understanding that the items in question are liable to alteration

Amendments will be possible up to the 15 January 1925, but after that date only minor alterations, not likely to cause delay in the issue of the Estimates, can be considered

Great inconvenience is caused by any neglect of the foregoing requirements, and I am to request that they may be strictly observed in all cases

Date of Statements of Expenditure, &c.

All statements of actual expenditure on new buildings should be made up to the 30th November 1924. The Estimates should not, however, be kept back on this account, but should

be rendered, if necessary, with such statements in blank, leaving the omitted figures to follow later.

A like rule will govern any other statements of actual expenditure, or of actual receipts, or of time actually spent in particular services, &c., that may be admitted into the notes to the Estimates.

Explanation of Estimates

My Lords desire to impress upon Departments the fact that a sufficient explanation should be furnished of the amount included for any given service, even if the figure shows a reduction on the previous year.

Vote on Account

During March next, Parliament will be asked to grant a Vote on Account sufficient to provide for the requirements of each service for the normal period of the Session.

You are required to inform the Treasury of the amount to be included in respect of the expenditure for which you account, on the basis of the proportions which have been found sufficient in previous years.

The amounts should be fixed as low as is consistent with safety, and explanations should be given in any case where special circumstances indicate a sum in excess of one-third of the total of the Estimate.

You are reminded that provision for New Services cannot be included in the Vote on Account.

The last sheet of this Circular, which is detachable, should accordingly be completed by you in accordance with the above paragraphs, and returned to the Accountant, H M Treasury, not later than the 1st February, 1925.

The annexed regulations should be strictly observed in filling up the forms of Estimates. Special attention is called to the additional particulars required in the Explanatory Statements referred to in Regulation 3, and to the alteration made in Regulation 8.

I am, Sir,

Your obedient servant,

[Signed by the Parliamentary Financial Secretary to the Treasury]

[There follow a number of detailed Regulations to be observed in preparing the Civil Service and Revenue Departments Estimates]

- 1 References to be given to Statutes
- 2 Unsanctioned Charges to be Excluded
- 3 Separate Explanatory Statements to be Enclosed

Expenditure during the current year

4 In addition to the information required by Regulation 3, the figures of actual expenditure under each Subhead should be given for the half-year to 30th September 1924. In any case where the expenditure in that half-year is not a reliable guide to the probable expenditure in the succeeding half-year, an explanation should be furnished and an estimate given of the probable expenditure in the second half-year.

- 5 Insertion does not convey Sanction
- 6 Reference to Treasury Letters
- 7 Progress Reports [on Special Services extending over more than one year]
- 8 Transfer of Charges—(a) between Subheads, (b) between Votes
- 9 Gross Charges to be Provided for
- 10 Mode of providing for Remuneration of Staff
- 11 Method of showing the Employer's Contributions under the National Insurance Acts
- 12 Extra Remuneration of Officers to be Noted
- 13 Personal Salaries
- 14 Incidental Expenses [to be confined to petty and casual charges]

15 Rates, Taxes, Insurance

16 Receipts in Cash and Stamps to be Estimated

17 Responsibility of Superior Departments

Title of Vote _____

Subhead	Explanation of the Estimate for 1925-26
A — SALARIES	
£	
Estimate 1925-26	
" 1924-25	
Expenditure 1924-25	
(Six months to 30th	
September 1924)	
Estimate Expenditure	
£ £	
1923-24	
1922-23	
1914-15	
B — TRAVELLING	
£	
Estimate 1925-26	
" 1924-25	
Expenditure 1924-25	
(Six months to 30th	
September 1924)	
Estimate Expenditure	
£ £	
1923-24	
1922-23	
1914-15	
RECEIPTS OR CREDIT SUB- HEAD	
£	
Estimate 1925-26	
" 1924-25	
Receipts 1924-25	
(Six months to 30th	
September 1924)	
1923-24	
1922-23	

II

The Departmental Estimates having been (a) finally decided in the Department, (b) sanctioned by the Treasury, (c) approved by the Cabinet, are before the close of the financial year (ending 31 March) presented to the House of Commons. The House considers the Estimates in Committee of Supply.

There follow (A) a typical *Estimate* (for convenience a small service (British Museum) is selected, being Class iv 2 of the Civil Service Estimates), and (B) the corresponding *Appropriation Account* of the same service, signed by the Accounting Officer and certified by the Comptroller and Auditor-General.

A The Estimate as presented to the House of Commons

(For year ending 31 March 1925)

BRITISH MUSEUM

I ESTIMATE of the Amount required in the Year ending 31 March 1925 to pay the Salaries and other Expenses of the BRITISH MUSEUM, and of the NATURAL HISTORY MUSEUM, including certain Grants in Aid (26 Geo 2, c 22, 41 & 42 Vict c 55, 57 & 58 Vict c 34, 2 Edw 7, c 12, &c, &c)

Three Hundred and One Thousand Seven Hundred and Ninety-three Pounds

II SUBHEADS under which this Vote will be accounted for by
the TRUSTEES of the BRITISH MUSEUM

	1924-25	1923-24	Increase	Decrease
	£	£	£	£
A—Salaries, Wages, and Allowances	131,443	129,476	1,966	—
B—Police	12,217	12,197	20	—
C—Purchases and Acquisitions (Grant in Aid)	25,000	21,000	4,000	—
D—Bookbinding, Preparing, &c	21,290	19,620	1,670	—
E—Printing Catalogues, &c	10,047	12,115	—	2,068
F—Fire extinguishing Appa- ratus	250	250	—	—
G—Furniture and Fittings	6,000	7,000	—	1,000
H—Incidental Expenses	6,433	6,455	—	22
I—Telephones	485	450	35	—
J—Annuity in Respect of Loan for Purchase of Land (57 & 58 Vict c 34) and Expenses of the Property	7,863	7,933	—	70
TOTAL, BRITISH MUSEUM NATURAL HISTORY MUSEUM, SOUTH KENSINGTON (Items similar to above)	£ 221,027	216,526	7,691	3,190
TOTAL, NATURAL HISTORY MUSEUM	£ 98,807	93,715	5,092	—
GROSS TOTAL	£ 319,834	310,241	12,783	3,190
Deduct— T—Appropriations in Aid	18,041	18,425	384	—
NET TOTAL	£ 301,793	291,816	13,167	3,190
		NET INCREASE	£9,977	

NOTE.—The expenditure out of the Grants in Aid included in this Estimate will be subject to audit by the Comptroller and Auditor-General, but the unexpended balances (if any) of sums issued will not be surrendered at the close of the financial year.

[This, though not uncommon in similar types of estimates, is a departure from the usual practice.—J A R M.]

	1924-25	1923-24
The total expenditure in connexion with this Service is estimated as follows		
Gross Estimate above	£ 319,834	£ 310,241
Estimated amount (net) included in other Estimates in connexion with this Service		
Buildings, Furniture Fuel and Light, &c , Class I, 6	62,060	66,680
Rates Class I 13	14,000	14,250
Stationery and Printing Class II, 30		
Printing, Paper, &c	1,000	} 950
Office supplies	150	
Superannuation, &c , Class VI 1	19,356	18,374
Post Office, Revenue Departments, No 3	600	600
TOTAL EXPENDITURE	£ 417,000	411,095
The receipts in connexion with this Service are estimated as follows		
Appropriations in Aid above	£ 18,041	18,425

III DETAILS of the foregoing

[Here follow members of staff and the actual salary or remuneration of each official from the Principal Librarian with £1,500 and official residence down to three housemaids at 21s a week each]

A —SALARIES, WAGES, AND ALLOWANCES

Numbers		TOTAL FOR SALARIES, &c	£133,042	131,476
1923 1924		Deduct—For Savings by vacancies,		
-24 -25		&c	1,600	2,000
413 413		NET TOTAL FOR SALARIES, &c	£131,442	129,476

B —POLICE

[Here follow details down to whistles]

Numbers			
1923 1924			
-24 -25			
26 26		TOTAL FOR POLICE	£12,217 12,197

FINANCIAL PROCEDURE (LEGISLATIVE) 529

C—PURCHASES AND ACQUISITIONS (GRANT IN AID)

For the Purchase of Objects for the Collections, and Expenditure for Freight, Carriage, Travelling, &c, in connexion with the acquisition of the same

£25,000 121,000

1924-25 1925-26

D—BOOKBINDING, PREPARING &c

[Six items follow]

TOTAL FOR BOOKBINDING, PREPARING, &c £21,290 16,620

E—PRINTING CATALOGUES, &c

[Eleven items follow]

TOTAL FOR PRINTING CATALOGUES, &c £10,047 12,145

F—FIRE-EXTINGUISHING APPARATUS

TOTAL FOR FIRE-EXTINGUISHING APPARATUS £250 250

G—FURNITURE AND FITTINGS

Maintenance Staff and materials £5,000 7,000

H—INCIDENTAL EXPENSES

TOTAL FOR INCIDENTAL EXPENSES £5,433 6,455

J—ANNUITY IN RESPECT OF LOAN FOR PURCHASE OF LAND (57 & 58 Vol c 34) AND EXPENSES OF THE PROPERTY

TOTAL FOR ANNUITY, &c £7,803 7,933

¹ These sums are paid into an account which is also credited with receipts from sales of duplicates

NATURAL HISTORY MUSEUM, SOUTH KENSINGTON

[K-R, Subheads and details similar to above]

Numbers				
1923	1924		1924	1923
-24	-25		-25	-24
		I ADMINISTRATIVE, SCIENTIFIC, AND CLERICAL	1924	1923
			-25	-24
1	1	Director (1,200 <i>l</i>)	1,200	1,200
5	5	Keepers of Departments (1,000 <i>l</i>)	5,000	5,000
1	1	Assistant Secretary (650 <i>l</i> -25 <i>l</i> -600 <i>l</i>)	729	704
2	2	Deputy Keepers of Departments (900 <i>l</i>)	1,800	1,800
37	37	Assistant Keepers (14) (175 <i>l</i> -25 <i>l</i> -800 <i>l</i>)	16,122	16,058
		Assistants (23) (250 <i>l</i> -20 <i>l</i> -290 <i>l</i> -25 <i>l</i> -410 <i>l</i>)		
—	1	Custodian of Siphonaptera (350 <i>l</i> inclusive) ¹	350	—
1	1	Staff Officer (400 <i>l</i> -15 <i>l</i> -500 <i>l</i>)	445	430
6	6	Clerks, Higher Grade (300 <i>l</i> -15 <i>l</i> -100 <i>l</i>)	2,070	1,980
1	1	Superintendent of the Subordinate Staff (150 <i>l</i> -5 <i>l</i> -200 <i>l</i>) ²	161	159
2	2	Hall Clerks ³ (100 <i>l</i> -5 <i>l</i> -110 <i>l</i>)	261	246

¹ An equivalent sum is received from the Rothschild Trust and is brought to account in Subhead F (Appropriations in Aid)

² The Superintendent and two Hall Clerks are provided with unfurnished official apartments, fuel and light. The scale of salary is personal to the existing Hall Clerks.

³ The present holder of this post has a personal increment of *pl* 10s.

FINANCIAL PROCEDURE (LEGISLATIVE) 531

	1923- 25	1923- 24
1 — APPROPRIATIONS IN AID	£	£
Dividends on 30,000/ Consols (26 Geo 2, c 22, s 48)	750	750
Receipts from the Sale of Museum Publications, old material, &c, &c	4,200	4,200
Receipts from the Sale of Pictorial Postcards and Reproductions	4,500	5,600
Rents from Houses, &c (57 & 59 Vict c 34)	8,060	7,700
Contribution from the Bridgewater Fund	175 ¹	175 ¹
Contribution from the Rothschild Trust to meet the salary of the Custodian of Siphonaptera (Subhead K)	350	—
TOTAL FOR APPROPRIATIONS IN AID	<u>£18,011</u>	<u>18,425</u>

B *The Corresponding Appropriation Account*

This is signed by the Accounting Officer of the Department (in this case the Principal Librarian of the British Museum) and certified by the Comptroller and Auditor General. It will be observed that the Appropriation Account refers to the year ended 31 March 1924, and must be read, therefore, in conjunction with column 2 in the foregoing Estimate (1 c for the year 1923-4). The Report and Audit are necessarily one year behind the *Expenditure*, and *two* years behind the *Estimate*, 1 c the audit for the year ended 31 March 1924 reaches the House of Commons at the time when it is considering the *Estimate* for the year ending 31 March 1926. This is inevitable.

¹ This sum is contributed from the Fund towards the salary of the Keeper of the Manuscripts, who acts as Egerton Librarian. Accounts of the income and expenditure of the Bridgewater Fund and certain other special trust funds are included in the Return relating to the British Museum which is annually presented to Parliament, and are submitted to audit by the Comptroller and Auditor General.

BRITISH MUSEUM

ACCOUNT of the Sum Expended, in the Year ended 31 March 1924, compared with the Sum Granted, for the Salaries and other Expenses of the BRITISH MUSEUM, and of the NATURAL HISTORY MUSEUM, including certain Grants in Aid

Service	Grant	Expenditure	Expenditure compared with Grant			
			Less than Granted		More than Granted	
	£	£ s d	£ s d		£ s d	
BRITISH MUSEUM						
A—Salaries, Wages, and Allowances	129,476	124,998 - 10	4,477 19 2		—	
B—Police	12,197	12,183 6 11	13 13 1		—	
C—Purchases and Acquisitions (Grant in Aid)	21,000	21,000 - -	—		—	
D—Bookbinding, Preparing, &c	19,620	19,810 18 7	—		190 18 7	
E—Printing Catalogues, &c	12,145	13,721 12 4	—		1,576 12 4	
F—Fire Extinguishing Apparatus	250	174 1 10	75 18 2		—	
G—Furniture and Fittings	7,000	6,265 16 -	734 1 -		—	
H—Incidental Expenses	6,455	6,115 10 7	339 9 5		—	
I—Telephones	450	486 1 -	—		36 1 -	
J—Annuity in respect of Loan for Purchase of Land(s) & 58 Vic. c. 34) and Expenses of the Property	7,933	7,832 10 -	100 10 -		—	
TOTAL, BRITISH MUSEUM	216,526	212,617 18 1	5,711 13 10		1,803 11 11	

EXPLANATION of the Causes of Variation between Expenditure and Grant

- A—Due to reduction in the rate of bonus
 E—Additional postcards and reproductions were prepared in readiness for the summer of 1924, and the grant for 1924-25 was reduced by a sum approximate to this excess
 F—The renewals of hose, &c, were less than anticipated
 G—Due to the fall in rates of wages and the employment of fewer men on maintenance work
 H—Glazing work was reduced and the rate of wages for cleaners fell
 I—This was a new subhead and the estimate was based on information furnished by the Post Office
 J—Specifications, &c, for which 100/ had been provided, were not required

Service	Grant	Expenditure	Expenditure compared with Grant	
			Less than Granted	More than Granted
NATURAL HISTORY MUSEUM, SOUTH KENSINGTON (Corresponding details follow)				
TOTAL, NATURAL HISTORY MUSEUM	£ 93,715	91,395 7 4	2,425 19 11	106 7 3
GROSS TOTAL	£ 1,10,241	301,013 5 5	8,137 13 9	1,909 19 2
			Surplus of Gross Estimate over Expenditure £6,227 11 7	
			Deficiency of Appropriations in Aid utilized £670 9 6	
Deduct— I—Appropriations in Aid	Estimated 16,425	Required 17 751 10 6	Net surplus to be surrendered £5,557 5 1	
NET TOTAL	£ 291,816	266,258 11 11		

EXPLANATION of the Causes of Variation between Expenditure and Grant—contd

T—The estimate of the receipts from the sale of postcards, &c, was used to 5000 for 1923-24, as against 4,000 in 1922-23, and the increase was not realized. The total amounts received under this subhead were as follows—

	Estimated	Realized
	£	£
Dividends on Museum invested funds	750	750
Receipts from the sale of Museum publications, old materials, &c	1,200	4,494
Receipts from the sale of pictorial postcards and reproductions	5,600	4,310
Rents from houses	7,700	8,020
Contribution from the Budgetary Fund	175	175
National Health Insurance—Refund by Ministry of Labour of employer's contributions	—	5

APPENDIX D

GRANTS IN AID ACCOUNTS

Subhead C—Purchases and Acquisitions (British Museum)			
Balance from 1922-23	£	s	d
Grant in Aid 1923-24	13,333	1	10
Donations	21,000	—	—
Proceeds of sales of duplicates, &c	2,005	2	10
	2,625	4	10
Expended 1923-24	35,963	9	6
	22,571	11	4
Balance to 1924-25	16,391	18	2
Subhead M—Purchases and Acquisitions (Natural History Museum)			
Balance from 1922-23	9,062	10	7
Grant in Aid 1923-24	5,500	—	—
Expended 1923-24	11,562	10	7
	4,716	—	6
Balance to 1924-25	£9,816	10	1

Frederic G. Kanyon,
Accounting Officer

British Museum,
30 September 1924

I have examined the foregoing Accounts in accordance with the provisions of the Exchequer and Audit Departments Act, 1921. I have obtained all the information and explanations that I have required, and I certify, as the result of my audit, that in my opinion these Accounts are correct.

Malcolm G. Ramsay,
Comptroller and Auditor General

C. Votes on Account

In order to keep the Civil Services going between the beginning of the new financial year (1 April) and the passing of the Appropriation Bill it is necessary to take Votes on Account. The Estimates for these are presented as early as possible after the meeting of Parliament, as the Consolidated Fund Bill, embodying these Votes (as well as (a) Excess Grants, if any, for the *previous* financial year, and (b) remaining Supplementary Grants for the *current* year), has to receive the Royal assent before 1 April.

Thus, an Estimate for the Vote on Account in respect of the Civil Services and Revenue Departments was presented to the House of Commons on 23 February 1925.

On p. 5 there is the entry

	<i>Required on account for 1925-26</i>	<i>Total Estimate for 1925-26 (Nil)</i>	<i>Total Net Estimate for 1924-25 (subject to transfers)</i>
No. of Vote Class IV 1 British Museum	£120,000	£295,941	£301,793

The last column, it will be noticed, corresponds to A. The Comptroller and Auditor-General's Report (B) showed in the previous year an over-estimate of over £5,500. The Estimate for 1925-6 is reduced by about that amount.

It is important to note that the Estimates are Estimates for individual services, each of which require a separate Vote, e.g. the Volume of Civil Service Estimates is made up of some 130 separate Estimates or Votes, the Navy Estimates cover 15 Votes plus the Vote for Men, &c., &c., each of which requires a separate Resolution in Committee of Supply and on the Report stage, whereas a Vote on Account, though it sets out the amounts needed for the separate Estimates, all ultimately to be voted in detail, only requires one Resolution and one Report for the globular total.

Votes on Account are not taken or required for the Army, Navy, and Air Services, as money obtained for one of the Votes for these services can be temporarily used for another. The custom is to pass cash Votes for each of these services for the ensuing year, and this enables the service to carry on without a Vote on Account.

There is also a *Civil Contingencies Fund* with a fixed capital of £1,500,000, out of which, in cases of urgency, advances are made to the Departments in anticipation of Parliamentary Votes. The sums advanced are repaid on the demand of the Treasury after Parliament has voted the money.

D *Supplementary Estimates*

These can be presented at any time to obtain money (a) for a new service, which was not included in the original Estimates, (b) for a service which had under-estimated its requirements for the current year. The following is a specimen of a Supplementary Estimate presented on 25 November 1925

1925-26

<i>No in Class</i>	<i>Page</i>	<i>Service</i>	<i>Amount</i>	<i>Accounting Department</i>
		CLASS VI	£	
134	3	BRITISH EMPIRE EXHIBITION GUARANTEE	1,100,000	Department of Overseas Trade
		UNCLASSIFIED SERVICES		
9	5	COAL MINING INDUSTRY SUBVENTION	9,000,000	Mines Department of the Board of Trade
			10,100,000	

Whitehall, Treasury Chambers,
25 November, 1925

RONALD McNEILL

The following Supplementary Estimates for 1925-26 have been presented to date

<i>H C Paper</i>	<i>Service</i>	<i>Amount</i>
		£
145	Colonial Office	10
"	Ministry of Transport	15,000
"	Public Education, Scotland	32,703
"	Diplomatic and Consular Services	60,000
"	Colonial Services	8,000
"	Middle Eastern Services	155,000
"	Repayments to the Civil Contingencies Fund	94,539
"	Relief of Unemployment	170,000
"	Grants for Compensation for Damage by Enemy Action	80,000
150	Navy	100
151	Air	10
159	Coal Mining Industry Subvention	10,000,000
		10,615,362
	Amount on this Paper	10,100,000
	TOTAL	£ 20,715,362

[Details and explanations follow of the Votes of £10,100,000 required]

I append the Resolution referring to the Supplementary Estimate printed above D

Supply [10th December],—Resolutions *reported*,

Civil Services Supplementary Estimate, 1925–26

Unclassified Service

1 'That a Supplementary sum, not exceeding £9,000,000, be granted to His Majesty, to defray the Charge which will come in course of payment during the year ending on the 31st day of March 1926, for a Subvention in Aid of Wages in the Coal Mining Industry'

Class VI

2 'That a sum, not exceeding £1,100,000, be granted to His Majesty, to defray the Charge which will come in course of payment during the year ending on the 31st day of March 1926, for defraying the liability under the Government Guarantee in respect of any loss which may result from the holding of the British Empire Exhibition under the British Empire Exhibition (Guarantee) Acts, 1920 to 1925'

These resolutions having been passed in Committee of Supply have to be confirmed by exactly similar Resolutions passed in Committee of the whole House on the Report stage. When a sufficient number of separate Estimates have been voted and the Resolutions reported, then in Committee of Ways and Means one Resolution is proposed to provide Ways and Means for the aggregate of the sums voted on the several Estimates.

E Consolidated Fund Bills

Before the issue of money to meet expenditure is authorized this Resolution, having been confirmed on Report, is embodied in a Consolidated Fund Bill. Of such Bills there may be several during a Session. One Consolidated Fund Bill is generally passed just before the close of the financial year. This Act authorizes the issue out of the Consolidated Fund of (a) the total sum voted for to complete the service of the year just about to end, and (b) votes on account for the ensuing year. The Act also includes borrowing powers for the Treasury.

Consolidated Fund (No. 1) Act for the Session 1925 was passed on 27 March 1925

The important clauses were as follows

CHAPTER 8

A D An Act to apply certain sums out of the Consolidated Fund
1925 to the service of the years ending on the thirty-first day of March, one thousand nine hundred and twenty-five, and one thousand nine hundred and twenty-six

Most Gracious Sovereign [Preamble],

Issue of 8,137,227¹ out of the Consolidated Fund for the service of the year ended 31st March, 1925

1 The Treasury may issue out of the Consolidated Fund of the United Kingdom, and apply towards making good the supply granted to His Majesty for the service of the year ending on the thirty-first day of March, one thousand nine hundred and twenty-five, the sum of eight million one hundred and thirty-seven thousand two hundred and twenty-seven pounds

Issue of 161,311,200¹ out of the Consolidated Fund for the service of the year ending 31st March, 1926

2 The Treasury may issue out of the Consolidated Fund of the United Kingdom, and apply towards making good the supply granted to His Majesty for the service of the year ending on the thirty-first day of March, one thousand nine hundred and twenty-six, the sum of one hundred and sixty-three million three hundred and fourteen thousand and two hundred pounds

3 —(1) The Treasury may borrow from any person, by the issue of Treasury Bills or otherwise, and the Bank of England and the Bank of Ireland may advance to the Treasury on the credit of the said sum, any sum or sums not exceeding in the whole one hundred and seventy-one million four hundred and fifty-one thousand four hundred and twenty-seven pounds

Power for the

to borrow

F *The Appropriation Act*

The year's cycle of 'Supply' is completed by the passing, at the end of the Session (or before the summer adjournment as the case may be), of an Appropriation Act which is a Consolidated Fund Bill and something more. It authorises the Treasury to issue a sum equal to the aggregate of the sums granted since the passing of the previous Consolidated Fund Bill, and gives the Treasury further borrowing powers. But

by an elaborate series of schedules it also appropriates the sum granted for each vote of the estimates exclusively to the service of that particular vote. The total expenditure thus authorized must not exceed the total supply granted. Thus the Appropriation Act of 1925, passed on 7 August 1925, authorized a total issue of

add	£254,772,058
	£163,314,200 (authorized by C. of A. Act of 27th March)
	<hr/>
	£118,086,258

which corresponds, as will be seen, to the sum demanded in the Budget for the Supply Services and certain supplementary estimates since voted. Should any further supply be voted after the Appropriation Act has been passed in August, a further Appropriation Act must be passed before the end of the Session.¹ This Appropriation Act completes the financial work of the session.²

But long before it is reached the House has had to turn from the business of supply to that of 'ways and means'.

G. The 'Budget'

At the earliest possible moment in the new financial year—generally on one of the first days after the Easter recess—a statement of Revenue and Expenditure is laid before the House of Commons, by the responsible Minister—as a rule the Chancellor of the Exchequer, but occasionally the Prime Minister, or First Lord of the Treasury. This includes (a) Statement of actual *expenditure* for the year just ended (31 March,) as compared with the estimated expenditure, (b) Statement of actual *Revenue*³ as compared with (i) the Budget Estimate, (ii) actual receipts for the previous year, (c) Statement of Expenditure to be provided for in the current year (this is merely a summary of the Estimates already laid and the Consolidated Fund Services, and reveals little not already known), (d) proposals for new taxation. The interest

¹ A Consolidated Fund (Appropriation) (No. 2) Bill was in fact introduced, to cover the supplementary sums (£10,100,000), on 11 December 1925.

² The Autumn Session was in 1912-13 prolonged into the New Year, and consequently the final Appropriation Act of that Session was not actually passed until the 7th of March 1913.

³ The Budget statement is based on *Treasury Issues* and Receipts, and not on *audited* expenditure and receipts.

of the statement culminates naturally in the last item. Appended is the Final Balance Sheet 1925-6 after the alterations proposed by the Chancellor of the Exchequer.

ESTIMATED REVENUE, 1925-26		ESTIMATED EXPENDITURE, 1925-26	
	£	CONSOLIDATED FUND SERVICES	
Customs	102,010,000	National Debt Services	355,000,000
Excise	137,220,000	Road Fund	10,900,000
<i>Total Customs and Excise</i>	<i>239,230,000</i>	Payments to Local Authorities Accounts, &c.	19,320,000
Motor Vehicle Duties	17,500,000	Payments for Northern Ireland Residuary Share, &c.	4,000,000
Estates, &c., Duties	66,500,000	Land Settlement	700,000
Stamps	24,000,000	Other Consolidated Fund Services	2,000,000
Land Tax, House Duty and Mineral Rights Duty	1,000,000		
Income Tax	262,000,000	TOTAL CONSOLIDATED FUND SERVICES	£391,920,000
Super Tax	6,300,000		
Excise Profits Duty, &c.	4,000,000	SUPPLY SERVICES	
Corporation Profits Tax	9,000,000	Army	11,500,000
<i>Total Inland Revenue</i>	<i>429,800,000</i>	Navy	60,500,000
TOTAL RECEIPTS FROM LANDS	£696,560,000	Air Force	15,513,000
Post Office	57,000,000	Civil Services	222,600,000
Crown Lands	900,000	Customs and Excise, and Inland Revenue Disbursements	11,391,000
Interest on Sundry Loans	12,600,000	Post Office Services	52,958,000
Miscellaneous		TOTAL SUPPLY SERVICES	£407,471,000
Ordinary Receipts	11,000,000		
Special Receipts	30,000,000	TOTAL EXPENDITURE	799,390,000
TOTAL RECEIPTS FROM NON-TAX REVENUE	£111,500,000	Surplus	1,660,000
TOTAL REVENUE	£801,060,000	TOTAL	£801,060,000

H Finance Bill

Most of the taxes are levied under permanent Acts, but new taxes, or variations in the rate of old taxes, or continuation of temporary taxes, have to be authorized by fresh legislation. The process is by 'Budget resolutions' in the Committee of Ways and Means. These resolutions go through the Report stage in the House, and are then embodied in the *Finance Bill* of the year which has to go through the regular course of a Bill.

APPENDIX E

FINANCIAL PROCEDURE (EXECUTIVE)

The sequence of the Financial Procedure of the Legislature has been detailed in the preceding appendix

The money for the public services having been voted and appropriated by Parliament, it remains to describe the machinery employed by the Executive Departments of Government to ensure that the money is spent in precise accord with the intentions of Parliament as defined in legislation

The Treasury is the hub of the machine, its procedure is regulated by the Exchequer and Audit Act (1866)

A The Royal Warrant for the Issue of Ways and Means

The grant of money is made by Parliament *to the Crown*

The first step, therefore, in the elaborate process of disbursement is taken by means of a Royal Warrant addressed to the Commissioners of the Treasury This order is issued under the Sign Manual and is countersigned by two Lords of the Treasury Appended is the form used in the case of Supply Services For payments for Consolidated Fund Services no Royal Order is required, because not only are the CF charges imposed permanently by Statute, but the money to meet them is not expressly granted to the Crown Otherwise the procedure is substantially the same in the case of Consolidated Fund Services

SPECIMEN

Royal Order

A Supply Services

*Whereas the several sums mentioned in the Schedule herunto annexed have been granted to Us, by _____
_____ to defray the expenses of the
Public Supply Services therein specified, which will come in
course of payment in the year ending 31st March 19—Our*

Will and Pleasure is, that you do, from time to time, authorize the Governor and Company of the Bank of England, or the Governor and Company of the Bank of Ireland, to issue or transfer from the account of Our Exchequer at the said Banks to the accounts of the persons charged with the payment of the said Services such sums as may be required, from time to time, for the payment of the same, not exceeding the amounts respectively stated in the said annexed Schedule

Provided that such issues or transfers shall be made out of the Credits granted or to be granted to you from time to time, on the account of Our Exchequer at the said Banks, by the Comptroller and Auditor General under the authority of the Exchequer and Audit Departments Act 1866 (29 & 30 V, c 39, s 15), and shall not exceed in the whole the amount of the Credits so granted out of the Ways and Means appropriated by Parliament to the Service of the said year

Given at Our Court :

By His Majesty's Command

*To the Commissioners }
of Our Treasury }*

[Overleaf is a schedule indicating (1) 'Supply Service for which voted or granted', (2) 'Amount', (3) 'Resolutions Reported']

B *The Requisition for Credit for Supply Services or Consolidated Fund on the Comptroller and Auditor General*

The Treasury, having received its warrant from the Crown, then requests the Comptroller and Auditor-General to grant credits to the Treasury at the Bank of England

The Requisitions for credit for Supply Services are for sums *in bulk*, whereas Requisitions for credit for C.F. Services are detailed

The Requisition, signed by two Lords of the Treasury, is in the following form

*Requisition for Credit**Supply Services*

Year 19—

Treasury, Whitehall

—19—

By Virtue of the Exchequer and Audit Departments Act, 1866 (29 & 30 V, c 39, s 15) We authorize and require you to grant to the Lords Commissioners of His Majesty's Treasury for the time being, on account of the Ways and Means granted for the service of the year ending 31st March 19 Credits on the account of His Majesty's Exchequer at the Bank of England and Bank of Ireland, or on the growing balances thereof for the following sums, vizt

At the Bank of England £

At the Bank of Ireland £

To the Comptroller,
and Auditor General }

C Credit for [Supply or Consolidated Fund] Services

The Comptroller and Auditor-General must next satisfy himself that the Requisition is in accord with the Grants of Parliament, to whom he must in due course report Having done so he issues to the Bank of England the following Order (ENGLAND)

CREDIT FOR SUPPLY SERVICES

YEAR 19—

EXCHEQUER AND AUDIT DEPARTMENT,

No ———

—————19—

By Virtue of the Exchequer and Audit Departments Act, 1866 (29 & 30 V, c 39, s 15), and of a requisition from the Lords Commissioners of His Majesty's Treasury, authorizing the same, I hereby grant a credit to the Lords Commissioners of His

Majesty's Treasury for the time being, on the account of His Majesty's Exchequer at the Bank of England, or on the growing balance thereof, to the amount of—

on account of the
Ways and Means granted for the service of the
year ending 31st March, 19—

Comptroller and Auditor General

To the Governor and Company }
of the Bank of England }

D Treasury Order to the Bank

This is ' the critical measure that releases the credit. Having had its power to make the issue verified by the independent control, the Treasury can now get the money ',¹ using for the purpose the following form which must be signed by one of the Secretaries of the Treasury, or an officer appointed by the Treasury

Supply Services [or Consolidated Fund Services]

YEAR 192 [or Quarter to 19]

Treasury, Whitehall

GREAT BRITAIN
(ORDER FOR ISSUES)

No —————

—————192

GENTLEMAN,

Under the authority of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict, cap 39, sec 15), and of the Credit granted to the Lords Commissioners of His Majesty's Treasury, by the Comptroller and Auditor General, on the Account of His Majesty's Exchequer at the Bank of England, under the provisions of the said Act I am commanded by the Lords Commissioners of His Majesty's Treasury to request that you will transfer the

¹ H. Young, *The System of National Finance*, p. 103

following sum, on the _____ inst, from
the said Account to the ¹ _____ in
your books, on account of the [Supply Service
undementioned] ²

SUPPLY SERVICE	AMOUNT		
	£	s	d

I am to request that when the sum
shall have been transferred accordingly, you
will transmit this authority to the Comptroller and Auditor General

I am, GENTILMAN,

Your obedient Servant,

*To the Governor and Company
of the Bank of England*

The Bank, having transferred the sums as requested, notifies the Comptroller and Auditor-General accordingly

As a system of control on issue nothing more perfect could be devised. The House of Commons having received the Audited Accounts of the Comptroller and Auditor-General, and the comments thereon of its own Select Committee of Public Accounts, may be satisfied that the money voted by it has not been illegally expended. But as a check upon departmental extravagance or waste this elaborate system of checks and counterchecks is, as frequently observed, useless.

E The Paymaster-General

The final cog in the machinery of disbursement is provided by the Paymaster-General. It will be noted that in form D the Treasury instructs the Bank of England to transfer a certain sum from the Exchequer account not to the account of a particular Department in its books but to a single account—

¹ In C.F. Services this space is blank

[or Consolidated Fund in Great Britain for the above-mentioned Quarter]

that, of the Paymaster-General. This is in order to avoid having a number of separate drawing accounts for different Departments at the Bank and to keep the cash balances there as small as is compatible with the daily requirements of the public service and as concentrated as possible. Generally speaking, then, orders (the equivalent of cheques) issued by Departments for the public service are drawn against a single official, the Paymaster-General, who acts as the banker of Departments. Each Department transmits to the Paymaster-General from day to day a list of the drafts it has drawn upon him, and he actually cashes these drafts through his central account when they are presented by the payees.

To the general rules indicated in the preceding paragraph there are one or two important exceptions. (1) The most important is that of the revenue-collecting Departments which have separate accounts at the Bank of England in their own names. They pay their salaries and expenses by cheques drawn on this account and into this account they pay the revenue they receive. Periodically, they adjust matters with the Exchequer by drawing from the Exchequer account at the Bank of England the amount of revenue they have intercepted to pay their expenses and then transfer the equivalent of the gross revenue from their account at the Bank of England to the Exchequer account. The other Departments have no Banking account, broadly speaking, except with the Paymaster-General. All their cash receipts, which may include, besides sums appropriated in aid, moneys payable to the Exchequer, often considerable, must therefore be paid through the Paymaster-General into his account at the Bank of England. These receipts are used for the time being to pay the bills of Departments. So far as receipts are concerned which, under the Estimates, may be appropriated in aid, there is an end of the matter, but ultimately the Paymaster-General has to pay over to the Exchequer account that portion of these receipts which represent payments due to the Exchequer and replaces the money by drawing from supply.¹

¹ It is not easy in so compressed a statement to describe the complicated functions of the Paymaster-General at once accurately and clearly. For a full account students of Public Finance should refer to Treasury Minute of 1885 (H.C. 115, 1885). This is printed verbatim in the Eptome to the Public Accounts Committee Report, p. 174 (ed. 1911).

APPENDIX F

SELECT BIBLIOGRAPHY

- I Dictionaries
- II Texts
- III General Works on the Science and Art of Government
- IV Political Institutions (Foreign)
 - (i) General
 - (ii) Ancient Greece
 - (iii) Switzerland
 - (iv) United States of America
- V Political Institutions The United Kingdom
- VI Political Institutions The British Empire
- VII Special Topics
 - (i) The Legislature
 - (ii) The Executive (Political and Permanent)
 - (iii) The Judiciary
 - (iv) Local Government
 - (v) Federalism
 - (vi) The Party System

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APPENDIX G

A list of the principal articles on subjects cognate to the contents of this work contributed by the author to periodical literature. For a similar list of articles on Economic Problems, cf. *Economics and Ethics* (Methuen, 1923), Appendix B, pp 289-90

Imperial Questions

- The Imperial Note in Victorian Poetry *XIXth*, Aug 1900
- Why Hail Ye ? (Imperial Conference of 1911) *XIXth*, May 1911
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- Empire Partnership *F R*, Dec 1921
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- Cabinet Government or Departmentalism? *XIXth*, Nov 1900
- The House of Lords as an Imperial Senate *I R*, June 1907
- Reform of the House of Lords *XIXth*, Jan 1909
- The House of Lords and the Budget *XIXth*, Aug 1909
- The Constitutional Crisis *XIXth*, Jan 1910
- The Crown and the Constitution *XIXth*, June 1910
- Is there a Conservative Party? *XIXth*, Dec 1910
- The Machinery of Constitutional Amendment *XIXth*, Feb 1911
- The Crown and the Crisis *F R*, Sept 1911
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- The Problem of a Second Chamber *L R*, July 1917
- The New Electorate and the New Legislature *F R*, Mar 1918
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- Politics and Politicians I *F R*, Oct 1918
- Politics and Politicians II *F R*, Dec 1918
- Parliament and Finance *E R*, Jan 1920
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- Quo Vadis? *F R*, Feb 1920
- Under which King? *F R*, Aug 1920
- Soviet v Parliament *F R*, Oct 1920
- President or Premier? *F R*, Nov 1920
- Machinery of Government *XIXth*, Dec 1920
- The Party System and Parliamentary Government *L R*, Oct 1921
- The Tory Tradition *L R*, Jan 1922
- Conservative Principles *XIXth*, Mar 1923
- The Problem of the Second Chamber *F R*, Mar 1925

- Democracy and Syndicalism *F R*, Oct 1925
 Whitehall and Westminster *E R*, Jan 1926
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The Irish Problem

- Ireland under Queen Victoria *F R*, Mar 1901
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 Swiss Democracy *L R*, Oct 1920
 Note — *XXth* — *Nineteenth Century and After* (Constable & Co)
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